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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1918.

No. 967.

DAKOTA CENTRAL TELEPHONE COMPANY, A CORPORATION, NORTHWESTERN TELEPHONE EXCHANGE COMPANY, A CORPORTION, NEBRASKA TELEPHONE COMPANY, A CORPORATION, AND SOUTH DAKOTA STATE TELEPHONE COMPANY, A CORPORATION,PLAINTIFFS IN ERROR,

vs

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, AS ATTORNEY GENERAL, AND JOHN J. MURPHY AND P. W. DOUGHERTY, AS AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF SOUTH DAKOTA

The State of Wisconsin, upon the relation of its Attorney General, has heretofore brought an action in the original jurisdiction of the supreme court of that state, for the purpose of restraining and enjoining the Wisconsin Telephone Company, a corporation of Wisconsin, and the agencies under its direction and

control, from charging rates for telephone messages in excess of those fixed by the provisions of its statutes and the order and determination of the Railroad Commission of Wisconsin. The supreme court of Wisconsin, on the 29th day of April, 1919, rendered a decision in said matter by a divided court, denying the application for injunction and dismissing the complaint, the ground of its decision being in substance that the police regulations referred to in the proviso of the joint resolution are "undoubtedly such regulations intended to insure the lives, health, moral and physical welfare and good order of the public and of the employees, as the state may see fit to prescribe." The court further holds that the suit was in effect a suit against the government, upon the authority of *Belknap v. Schild*, 161 U. S. 10; *International P. S. Co. v. Bruce*, 194 U. S. 601, and *Wells v. Roper*, 246 U. S. 535. Said decision was rendered too late to enable the state to bring the same to this court by writ of error in the regular course, in time to permit consolidation with the actions involving the determination of the same questions, now pending herein, and it is assumed that, if brought here for review in due course, additional briefs will not be desired. In lieu thereof, by virtue of said facts, and by reason of the interest of the State of Wisconsin and its citizens in the decision of these actions, the undersigned, representing the State of Wisconsin, with the consent of the Attorney General of South Dakota, do hereby pray leave of this court to file this, their brief, as *amici curiae*, in support of the power, authority, and duty of this court and the appropriate courts of the various states to grant

relief by injunction, restraining the various telephone companies acting under the direction of the Postmaster General from putting into effect rates in excess of those determined to be reasonable and lawful by the properly constituted tribunals of the various states.

It being assumed that the briefs already filed contain a statement of the case, the questions involved, and the manner in which they are raised and a specification of the errors relied upon, this argument will be confined to a discussion of the following points of law which it is believed are decisive of the present controversy.

STATEMENT OF THE POINTS OF LAW

I. The suits for injunction by the various states are not actions against the United States, and it is not a necessary party.

II. No question of war power involved, because imperative necessity in extreme case only justification for taking private property even by military officer without due process.

III. There is nothing in the language of the resolution or in the purpose to be served warranting the inference that Congress intended to interfere with state regulation of intrastate rates, but, on the contrary, it affirmatively appears that it did not intend such interference.

IV. Provisions giving Interstate Commerce Commission power to fix telephone rates not repealed; consequently it still retains power, and Postmaster

General does not possess it either as to interstate or intrastate rates.

V. The joint resolution and presidential proclamation cannot be construed as contended by the government and telephone companies, because such construction would render the resolution void, by reason of conflict with the fifth amendment and the tenth amendment of the federal constitution, and would violate the rule against the delegation of legislative power.

VI. Assuming that the President was given the rate making power by the act in question, it was not delegated by him to the Postmaster General.

VII. Rate making power, if granted by joint resolution, vested in President personally, and cannot be delegated.

VIII. Does attempt by President to delegate all, or as in this case, more than the discretion vested in him entirely invalidate proclamation, so as to confer no authority on Postmaster General at all?

IX. Practical construction of the law by the Postmaster General and the telephone companies, as illustrated by compensation agreement.

ARGUMENT

I

THE SUITS FOR INJUNCTION BY THE VARIOUS STATES ARE NOT ACTIONS AGAINST THE UNITED STATES, AND IT IS NOT A NECESSARY PARTY.

The conception that the United States is in any way interested in the present controversy and that the court can dispose of the issues without consideration or interpretation of the Joint Resolution of Congress and the Proclamation of the President pursuant thereto presents a curious inversion of logic which in effect begs the whole question. This, it seems to us, is what the learned court of Massachusetts has done.

We submit that if the postmaster general has the power to fix intrastate telephone rates, then his act is that of the United States; if he has no such power, then his attempt to fix such rates is a mere personal assumption of authority, which affords him no protection, and which affords no protection to those acting or pretending to act by his direction. The court cannot escape the determination of the extent of the authority of the postmaster general. That is a necessary preliminary to any decision.

Supposing that the postmaster general underwent a like misconception as to his powers in postal matters and sought to collect a ten cent postage where the law permitted only three cents. Would it then be contended that, if suit were brought in a state

court to restrain such extortion, the United States Government was being sued without its consent, or that we were attempting to interfere with the revenues of the United States? Obviously not. The seven cents of excessive postage would not be revenue, and the action of the postmaster general would not be the action of the United States, but merely his individual assumption of arbitrary power, whose exercise a court of equity would promptly restrain. There is no controversy between the state and federal government here, in any sense whatever. The sole question is that of proper construction of a federal law, with a view of determining whether Albert S. Burleson has issued legal instructions as postmaster general within the scope of properly delegated power, to the defendant companies or whether the order is his mere personal pronunciamento, obedience to which affords the defendants no protection.

That these actions are not suits against the United States and in no way involve the government of the United States unless they question or seek to challenge a valid exercise of authority under a valid law, has in our judgment been so conclusively and satisfactorily established by the brief of Mr. Hughes and his associate counsel, in the recently argued case of the *Commercial Cable Company v Albert S. Burleson and Newcomb Carlton*, that we shall only refer to the cases there cited, to-wit, *Little. v Barreme*, 2 Cranch. 170; *U. S. v. Lee*, 106 U. S. 196; *Lindal v. Wesley*, 167 U. S. 204, to which we would add these additional citations:

Wadsworth v. Boysen, 148 Fed. 771, at page 779.

Board of Liquidation v. McComb, 92 U. S. 531, at p. 541.
In re Ayres, 123 U. S. 443, at p. 504 and p. 506.
McGahey v. Virginia, 135 U. S. 662, at p. 684.
Poindexter v. Greenhow, 114 U. S. 270, at p. 288:

"The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish it."

Hagood v. Southern, 117 U. S. 52, at p. 70.
Scott v. Donald, 165 U. S. 107, at p. 112.
Ex parte Young 209 U. S. 123 p. 159.

Their argument (p. 26) is equally decisive on the proposition of the power and the duty of the court to inquire as to the scope of the authority asserted.

Field v. Clark, 143 U. S. 649.
Buttfield v. Stranahan, 192 U. S. 470.
Union Bridge Co. v. U. S., 204 U. S. 364.
American School of Magnetic Healing v. McAnulty, 187 U. S. 94.
Interstate Commerce Commission v. L. & N. R. Co., 227 U. S. 88, 91.

And we cite these additional cases:

U. S. Railroad Administration v. Burch, 254 Fed. 140, passing upon the extent of the power of the director general of railroads under the cognate statute for the control of railroads, contains this language:

"All acts done and all property taken possession of within the adjudicated extent of the powers allowed might be a ministerial question: but as to

> the extent of those powers, and whether the powers were given, must always, under the Constitution of the United States, remain a judicial question, and one to be decided by the courts of the land."

State ex rel. Caldwell, 170 N. W. 570 (S. Dak.) (Advance Sheets, Februrary 21, 1919):

> Head Note 1: "The jurisdiction and power of civil courts may extend to ministerial acts which an executive officer of state, such as the President, or those acting under him, may assume to do by virtue of his office, but which may be found to have been in excess, beyond the scope, or a misuse of his authority."

Friesen v. Chicago, R. I. & P. Ry. Co., 254 Fed. 875. The court in construing the railroad administration act says of the powers of the President thereunder—

> "he may not take action contrary to the provisions of this act of Congress."

The cases relied upon by the supreme court of Massachusetts:

> *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599;
> *Louisiana v. Garfield*, 211 U. S. 70, 77, 29 Sup. Ct. 31, 53 L. Ed. 92;
> *Oregon v. Hitchcock*, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. Ed. 935;
> *Naganab v. Hitchcock*, 202 U. S. 473, 26 Sup. Ct. 667, 50 L. Ed. 1113;
> *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 606, 24 Sup. Ct. 820, 821 (48 L. Ed. 1134);

as demonstrated in the brief of Messrs. Cook and Hughes (pp. 35–5) are quite beside the point. The

present actions are brought, not to interfere with the possession or use of property by the United States, but are brought to prevent the infringement of individual right under the guise or pretext that authority to do so is conferred by federal statute, and the very question to be answered is: Does the statute confer such authority?

II

NO QUESTION OF WAR POWER INVOLVED, BECAUSE IMPERATIVE NECESSITY IN EXTREME CASE ONLY JUSTIFICATION FOR TAKING PRIVATE PROPERTY EVEN BY MILITARY OFFICER WITHOUT DUE PROCESS.

Neither is the issue to be confused by any misty conception of supposed war power on the part of the President. The war power and the peace power of the President, outside of the three kinds of military jurisdiction under the constitution set forth by Chief Justice Chase in Ex Parte Milligan, 4 Wall. 2, at pages 141–42, are one and the same thing. We have nothing to do here with the class of military rule covering the conduct of military forces in the government of occupied territory, nor are we dealing with that other class of military government concerned with the government of the Army and Navy proper. Congress, had it seen fit to do so, might no doubt have passed an enactment as it did during the Civil War (Vol. 12, U. S. Stats. at Large, p. 334, ch. 15, 37th Congress):

"to place under military control all the officers,

> agents, and employes belonging to the telegraph and railroad lines thus taken possession of by the President, so that they shall be considered as a post road and a part of the military establishment of the United States, subject to all the restrictions imposed by the rules and articles of war."

There is sufficient similarity to the Civil War act in the resolution under consideration to lead to the belief that Congress consciously rejected this alternative of making the telephone business a part of the military organization of the United States. This being true, both the first and second classes of military rule do not obtain. The only possible theory, there could be then, is that a species of stratified martial law must have been projected across and athwart the existing subdivisions of government, and have completely enveloped and controlled the conduct of this business.

This is an impossible conception, because, we submit, the government of no state and no portion thereof can be part martial and part civil. It must either be all one or all the other. As phrased *In re Kemp*, 16 Wis 359, 376:

> "When martial law exists, it must be supreme in order to be effectual. It cannot co-exist with the civil power; if it does, the latter must be in entire subordination to it."

The implication of the language in the pleadings leads to a definition quite as strong as that stated by the Duke of Wellington:

> "Martial law is neither more nor less than the will of the general who commands the army."

And as stated *In re Egan*, 5 Blatchford 319 (Federal Cases, No 4303), at p. 321:

> "The entire population of the country, within the confines of its power, is subjected to the mere will or caprice of the commander. He holds the lives, liberty and property of all in the palm of his hand."

U. S. v. Diekelman, 92 U. S. 520, at p 526:

> "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will."

Is it not a sufficient answer to this proposition, that the court, in common with every citizen of the nation, knows that martial law and nothing approximating it has either been declared or attempted to be declared?

In the absence of such declaration of martial law, the rule governing even the military department of government, from the commander-in-chief down through all of his subordinates, as to the violation of the individual right to life, liberty, and property, has repeatedly been declared. Chief Justice Dixon said: In Re Kemp supra 368.

> "The powers of the president as commander-in-chief of the army and navy in time of war, are strictly constitutional powers."

And Justice Cole phrased it, at p. 377:

> "Wherever war exists there martial law may be declared. But it must be confined to fields of strife and actual conflict, and cannot be extended to states not the theater of military operations."

As it appeals to us, this confusion has arisen—because the telephone and telegraph properties hav-

ing been taken under the war power of Congress and their operation entrusted to the President, he being the commander-in-chief of the army and navy, it has been assumed that in the exercise of the power delegated—the operation of the business—the military commander is discharging military functions. Sight has been lost, apparently, of the proposition that so far as this exercise of authority is concerned, both the President and postmaster general, and anyone acting under them or either of them, are acting solely and entirely as the agents of Congress. We insist most earnestly that, except as the President asserts his power through one of the three appropriate channels of military government in the strict sense, he has no other or different power in time of war than he has always had. We insist that Conress did not and could not confer any addition or enlargement to his power in that respect, because it in turn is bounded and limited and hedged about by the constitution. It can confer no power to violate the constitution, because it possesses none itself. It cannot delegate either to the President or the postmaster general, in their purely civil capacity, absolutely unrestricted authority to disregard constitutional restraints, because Congress itself does not possess that power. Neither can Congress enlarge his military powers, because within their sphere they are already absolute and supreme. Congress cannot, we insist, engraft a military power, a "war power," so-called, upon the discharge of a purely civil function, nor invest with military attributes a purely civil power.

When we find how jealously the courts have viewed the exercise of purely military functions them-

selves, where they transgressed civil rights, we should naturally expect this to be the rule. We find the supreme court of the United States, speaking through its Chief Justice, in *Mitchell v. Harmony*, 13 Howard 115. This case contains a discussion of the right of even a military officer to take private property of a citizen without due process of law.

The holding of this case was likewise discussed in detail in the brief in the Commercial Cable case (pp. 17, 18, 19, 20), and we shall not repeat the language because the court has recently had the reasoning thereof thus fully presented. Further support of this position, however, is found in *Raymond v. Thomas*, 91 U. S. 712, at p. 716:

> "It is an unbending rule of law that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires."

McLaughlin v. Green, 50 Miss. 453, at p. 467:

> "In flagrant war, power does not belong to a military officer, merely as such, to take or to destroy the property of the citizen, unless a necessity exists to apply it to military purposes, or to prevent its capture by the enemy."

United States v. Russell, 13 Wall. 623, 627–629:

> "Taking of private property by the government when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such cir-

cumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice."

Miller vs. United States, 11 Wall. 268, at p. 310:

"It may be conceded that the laws of war do not justify the seizure and confiscation of any private property except that of enemies."

Willoughby on the Constitution, Vol. II, p. 1235:

"Whatever interference there may be with his (the citizen's) personal freedom or property rights must be justified, as in the case of the police power, by necessity, actual or reasonably presumed."

We are not surprised at the firmness with which the arrogation of military power in the discharge of civil duties has been unanimously rebuked by courts, even when their judgment seemed to draw in question the martyred Lincoln's acts.

The supreme court of Illinois, speaking in *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159, at p. 170, said:

"The doctrine that a state of war of itself suspends, at once and everywhere, the constitutional guaranties for liberty and property, finds no support in the constitution, and is inconsistent with every principle of civil liberty and free government."

And in the concurring opinion, at p. 179, Justice Breese said:

"The constitution of the United States was designed by its framers, and has been hitherto so

understood by the people, to be the same protecting instrument in war as in peace; that a state of war does not enlarge the powers of any one department of the government established by it, nor has any one of these defendants any right to urge 'necessity,' or 'extraordinary emergencies,' as a plea for the usurpation of powers not granted."

A case arose in Kansas where a law had been enacted providing that members of the national guard should, while in the performance of military duty, be transported on all railroads of the state at the rate of one cent per mile, a situation quite closely analogous to a similar enactment by Congress, or an enactment purporting to confer power to have governmental messages transmitted at one-half or one-third their cost, or at such amount as Congress might have seen fit to fix, the only difference being that in the supposed case Congress acted directly, while in this case the postmaster general is seeking to act in the exercise of some supposed delegation of power.

As the Kansas court said *In re Gardner*, 84 Kans. 264, 113 Pac. 1054, 33 L. R. A. (N. S.) 956, at 958:

> "Without any ground, therefore, for the classification, and without any regard to the reasonableness or unreasonableness of the regulation, the state simply demands that its troops be transported by rail at the purely arbitrary rate, which, so far as the principle involved is concerned, might be 1 cent per hundred miles, or nothing at all."

And at p. 959:

> "An effort is made to justify the statute as an exercise of the military power of the state to pre-

serve peace, to suppress riots and insurrections, and to repel invasion. These are ends which every sovereignty must have the power to attain, and every citizen holds his property upon the implied condition that it must be surrendered when needed for the preservation of the government. Fields and farms may be traversed and occupied, subsistence, stores, and other movables may be appropriated, and transportation lines may be seized and operated, under the stress of due occasion, just as city blocks may be demolished to arrest the progress of a fire. Doubtless, in cases where neither the power of taxation nor the credit of the government would avail, a forced loan could be effected by the seizure of money itself. The power exercised in such cases is lawful, although not derived from constitutions or statutes. It rests upon the principle that every sovereignty may in time of peril adopt such extreme measures as may be necessary for existence and perpetuity. But it is limited to emergencies which cannot wait upon due process of law. The law governing military impressment of private property was well stated by Chief Justice Taney in the case of Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75," as quoted above.

And on page 960:

"When, however, the government is in no extremity in fact which requires the suspension, in whole or in part, of the civil laws, contributions to its support cannot be levied upon private persons or corporations, except pursuant to laws which prescribe the occasion, modes, conditions, and agencies for the appropriation, and which bear equally upon all those who are similarly situated."

State ex rel. Mays v. Brown, 45 L. R. A. 996 (N. S.) 77 S. E. 243 (W. Va.)

Willoughby on the Constitution, p. 1243:

"Private property may be seized and appropriated to a public use without the consent of the owner, when the public necessity demands. This taking of private property is, however, the courts have declared, not an exercise of military power which gives to the owner no claim for compensation, but a taking for the public use which, under the provision of the Fifth Amendment, demands that compensation be made. The manner of taking may, however, be that of the police power, in that the urgency may not permit the ordinary proceedings for valuation and condemnation."

Jones v. Seward, 40 Barbour 563, at p. 573:

"In sudden emergencies, caused by invasion or insurrection, the power expressly given by the constitution and the acts of congress, to repel the one and suppress the other, are ample and effective; and it requires no exercise of arbitrary power over the sacred rights of personal liberty to accomplish this purpose. It is as manifest as the day, it is beyond all controversy, that these rights, in war or in peace, during invasion or domestic violence, even during the hideous rebellion which now confronts us, are, except in the cases which I have stated, inviolable. The president, therefore, whether in his civil capacity or as commander in chief of the army and navy of the United States has, unquestionably, no power to authorize the act of which the plaintiff complains."

Corbin v. Marsh, 63 Ky., II Duvall, 193:

"* * * We premise that the constitution of the United States, in its declared and necessary supremacy, is the same fundamental, paramount, and inviolable *law* of the sovereign people, at all times and under all circumstances—that it is supreme over all—the citizens, the States, and the

national government in all its departments and operations, military as well as civil—and that it is as supreme in war as in peace."

And finally, the fallacy of this proposition would have seemed forever set at rest by this court in its classic statement of the law in *Ex parte Milligan*, 4 Wall. 2, at pp. 120–121, which is likewise quoted in the brief of Mr. Hughes (p. 32).

III

THERE IS NOTHING IN THE LANGUAGE OF THE RESOLUTION OR IN THE PURPOSE TO BE SERVED WARRANTING THE INFERENCE THAT CONGRESS INTENDED TO INTERFERE WITH STATE REGULATION OF INTRASTATE RATES, BUT ON THE CONTRARY, IT AFFIRMATIVELY APPEARS THAT IT DID NOT INTEND SUCH INTERFERENCE.

1. The rule that clear and explicit language is required to take the power of regulation from the state government.

Assuming that Congress might by appropriate action invade the exclusive domain of state regulation of intrastate matters, we contend that such invasion is never to be presumed and is never to be held consummated, except and unless the act of Congress employs such phraseology, as to leave the intention to divest the states of their sovereign power, an absolutely unescapable conclusion from the words employed. Cases will be submitted below,

arising necessarily and naturally under phraseology where it was contended that the state had voluntarily divested itself of the power of regulation. And if, as we shall see, a very strict rule is laid down to guard against such result, unless an absolute necessity from the language of the act construed, how much more rigid must the rule be where the court is asked to find that such power is being taken from a sovereign state, not by its voluntary act, but involuntarily over its protest, and from a domain or sphere that has always been jealously protected and guarded as peculiarly and exclusively within the scope of state regulation, and state regulation alone.

(a) In delegation to municipalities.

The supreme court of Wisconsin has ruled upon this proposition.

Manitowoc v. Manitowoc & Northern T. Co., 145 Wis. 13, at p. 28:

> "It is only where the right is very clearly conferred that the state will be held to have relinquished its power to enact laws regulating tolls."

The supreme court of the United States has ruled upon the proposition in repeated instances with decisive language. Illustrations follow:

> *Railroad Commission Cases*, 116 U. S. 307, at p. 325:
>
> "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power."

Home Telephone Co. v. Los Angeles, 211 U. S. 265, at p. 273:

"The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the State are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point. * * * But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

Stanislaus County v. San Joaquin, 192 U. S. 201, at 210–211:

"To regulate or establish rates for which water will be supplied is in its nature the execution of one of the powers of the State, and the right of the State so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain."

Freeport Water Co. v. Freeport City, 180 U. S. 587, 599. The court said:

"The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public the court applied the rule declared in many cases," quoting the language of *Railroad Commission Cases*

above, and adding: "The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted."

Owensboro v. Owensboro Waterworks Co., 191 U. S. 358. Same rule, citing *Railroad Commission Cases*, and others.

Joplin v. Light Company, 191 U. S. 150, 156: "The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied."

Nelson v. City of Murfreesboro, 179 Fed. 905, stating the strict rule to be applied in determining whether a state has been divested of sovereign or governmental power, adopts the language of other cases, and says, at 911, that it must be "in language explicit and express or necessarily to be implied from other powers," and that "if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

Citizens' St. Ry. v. Detroit Ry. Co., 171 U. S. 48, lays down this test for determining whether the sovereign state has been divested of governmental power:

"The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in *Grand Rapids &c. Power Co. v. Grand Rapids &c. Co., supra*, says: . . . 'that municipal corporations possess and can exercise only such powers as are 'granted in *express words*, or those *necessarily* or *fairly* implied, *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.*'' The italics are his. This would make 'necessarily implied' mean inevitably implied. The Court of Appeals of the Sixth

Circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in *Wilkinson v. Adam*, 1 Ves. & B. 422, 466, that 'a necessary implication means not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator, cannot be supposed.' "

(b) In assumption by federal government.

We find that the supreme court of the United States has not been silent upon the proposition suggested as to its attitude when an effort was made to pare away any of the inherent police power of the state by congressional action, but sustains with equal emphasis the doctrine that such jurisdiction and control is never deemed to have been divested by mere implication.

In *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, speaking of the rule to be applied to its creature and agency when engaged in purely intrastate business, the court said:

"It must have been known that, in the nature of things, the control of that business would be exercised by the State, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in *language whose meaning would be clear.*"

In *Reid v. Colorado*, 187 U. S. 137, 148, the court, speaking by Mr. Justice Harlan, said:

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when

it may do so, unless its purpose to effect that result is clearly manifested."

In *Savage v. Jones*, 225 U. S. 501, 533, the court said:

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." (Citing many cases.)

M. K. & T. Ry. Co. v. Harris, 234 U. S. 412, at pp. 418–419:

"A state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject."

Ill. Cent. R. R. Co. v. Public Utilities Comm. 245 U. S. 493 at 510.

"In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done unless, and except so far as its purpose to do so is clearly manifested."

2. No language used clearly manifesting intention to divest state of rate making power.

What, then, is the language "whose meaning is clear," which "fairly interpreted is in actual conflict with the law of the state," whose purpose to effect that result is clearly manifested, under which the states are to be held divested of the rate making power? Where is "the actual repugnancy" found?

The language of the act is before the court. The solicitor for the Postoffice Department has said:

> "It would seem that language could not add anything to the sweeping power to *possess*, to *control*, and to *operate* in such manner as the President should deem *needful* or *desirable*."

But the law does not say that. It says, "as may be needful or desirable," not "as the President may think needful or desirable." And of course the last words quoted are clearly modified by the prior language of the act, relating to the national security or defense.

The proclamation of the President, in express terms, states: "It is deemed necessary for the national security and defense * * * to operate the same in such manner as may be needful or desirable." This phrase, "needful or desirable," we think, must necessarily and naturally be construed as referring to and stating such quality of necessity or desirability as is required for the national security and defense. It does not, of course, refer to a need or desirability from the standpoint of the telephone companies themselves, but is solely the necessity or desirability

of furthering the national security or defense that is to be considered. In other words, the postmaster general and the President are to operate the telephone system in such manner as may be needful or desirable to secure or to bring about the national security and defense.

(a) President sole judge of necessity of taking, but not of method of operation—Cannot exercise arbitrary power.

A distinction, we think, is here recognized. The President is the *sole* judge of whether or not it is necessary to take possession, assume control, and operate the telephone systems, but unlimited discretion and power is not conferred upon him as to the manner of such operation. He and the postmaster general, we think, are expressly limited in their jurisdiction to operation in such manner as may be needful or desirable for the national security or defense, and *they are not* the sole judges of what manner is needful or desirable for the national security or defense.

(b) Question whether given manner of operation is needful or desirable is for the court.

Assuming that the words employed were broad enough to confer the power to regulate rates—and we think they are not—the court is free to inquire as to whether any act to be done has any necessary or proper relation to the national security or defense, and as a necessary preliminary to sustaining the exercise of power, has a right to determine whether

or not any proposed action has, in any reasonable view of the matter, any relation at all to the "national security or defense."

The act does not in express terms invest the President with the determination of what is "needful and desirable." And consequently, having exercised the power to take over the lines in their operation, he is limited by what is actually needful or desirable in the interest of the national security and defense. In other words, *it is for the court* and not for the President or postmaster general to determine whether it was either needful or desirable to intrude into the domain of state regulation and arrogate the power of regulating purely local rates. And if there is, in fact, no basis for saying the abolition of state regulation is either needful or desirable in the promotion of the national security, then the court will say that the postmaster general has not the power to make the encroachment. Such, we think, is the clear effect of the case of *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91, where the court said:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed *by no other officer, administrative body, or tribunal under our Government.* It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by *administrative fiat.* Such authority, however, beneficently exercised in one case, could be injurously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of *all arbitrary exercise of power.*"

This case is cited in the brief of Mr. Hughes with many others, to the proposition "that Congress could not constitutionally delegate and by the joint resolution did not attempt to delegate to the President arbitrary power." Among other cases cited are:

Yick Wo v. Hopkins, 118 U. S. 356, 369, 370;
Field v. Clark, 143 U. S. 649;
Buttfield v. Stranahan, 192 U. S. 470;
Union Bridge Co. v. U. S., 204 U. S. 364;
Lewis v. Frick, 233 U. S. 291, 297;
Gegiow v. Uhl, 239 U. S. 3, 9;
American School of Magnetic Healing v. McAnnulty, 187 U. S. 94;
Philadelphia Co. v. Stimson, 233 U. S. 605, 620;
Degge v. Hitchcock, 229 U. S. 162, 171.

Apparently that was just exactly the theory entertained by the court, in the case of *United States Railroad Administration v. Burch*, 254 Fed. 140, decided November 30, 1918, reported February 6, 1919, where it was said:

> "Under this statute, the President could authorize the Secretary of War only to take possession of such property as he himself is authorized to take possession of under the statute. The extent of his powers, and the definition of what property he was authorized to take possession of under the statute, would be necessarily a judicial question."

The circumstances under which the power is attempted to be exercised in the present case clearly negative any relation whatever to the national security and defense, because the step was not undertaken until a full month after the armistice was signed; and when the national security and defense were no longer subject to any actual or even potential

challenge. This would clearly be sufficient to negative and overthrow the validity of the exercise of the power in the instant case.

Consequently, it is our position and belief that the act, without the proviso, does *not* clearly indicate a purpose to take the rate making power from the states.

The natural and ordinary meaning of the language employed is that aptly used in the creation of a receivership. This, we think, is the terminology employed. By reference to general language on the subject, we are struck at once with the practical identity of the phrasing.

3. Use of terms, "supervision," "possession," "control," and "operation," as found in the law of receivership.

23 *Am. & Eng. Encyc.* 1000. "A receiver is an officer of the court through whom the court takes possession of property. * * * (1086) When appointed he is entitled to take *possession* and *control* of the property or funds involved and to manage and dispose of the same under the direction of the appointing court."

24. *Am. & Eng. Encyc.* 4. "A receiver of a railroad is merely such a functionary appointed for the purpose of taking possession and generally *operating* and managing for a time a railroad under the *orders* and *control* of the court."

34 *Cyc.* 16 refers to a receiver as an indifferent person appointed by the court "to hold *possession* and *control* of property which is the subject matter of litigation."

And it is said at page 284 that while the court "will not usually appoint a receiver to permanently continue such *operations*," it may do so, in the exercise of a wide discretion. While it is ,of course, a commonplace of the law of receivership that the functions of the receiver are exercised under the *supervision* of the court (as appears from the subtitles, 34 *Cyc.* 246, Supervision, Orders, and Instruction of Court; 248, Exercise of Supervision), we find, therefore, that all of the terminology employed in this act is such as is customarily found in the law of receiverships and the provisions for their appointment.

A receiver might have been appointed by a court in a proper case to take possession and assume control of any individual telephone and telegraph system and to operate the same in the discretion of the court, such possession, control, and operation all being exercised under the supervision of the court, and it is submitted that the only difference between such receivership and what was intended by the present act was that, instead of one receiver appointed for one system, and another receiver for another system, what was done by Congress was, in effect to subject the entire telegraph, telephone, cable, and radio systems of the United States to a receivership, and to invest the President, if he saw fit to exercise the same, with jurisdiction to supervise the operations of such systems, as a court of equity would supervise them, and to take possession and assume control and operate the same as a court of equity would do through its receiver. This, we think, is the natural and ordinary meaning of the language that Congress used, and that the president employed in his delega-

tion of power. As a receiver is appointed in an ordinary case to conserve the property and prevent the dissipation of assets on behalf of the creditors and stockholders, so in this case, in the language of the act as originally introduced, possession, control, supervision, and operatioon were to be exercised, "to insure the continuous operation of electrical communicating systems."

Such has been recognized to be the status of the Director General of Railroads. In *Rutherford v Union Pac. R. Co.*, 254 Fed. 880, it is said, at p. 881:

> "Under these acts of Congress and the proclamation of the President the Director General is a carrier. He conducts the business of receiving and transporting goods and passengers for hire. A receiver of a railway company is a carrier as to the goods and passengers transported, (*United States v. Nixon*, 235 U. S. 231, 234, 35 Sup. Ct. 49, 59 L. Ed. 207; *United States v. Ramsey*, 197 Fed. 144, 146, 116 C. C. A. 568, 42 L. R. A. (N. S.) 1031), and the office of the Director General is analogous to that of a receiver of the railway companies."

Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, 253 Fed. 453 (Advance Sheets):

Head Note: "A court cannot authorize its receivers for a street railroad company to charge a higher rate of fare than that fixed as a maximum by the company's franchise."

Ohio & M. R. Co. v. Russell (Ill.), 3 N. E. 561, was was an action that had to do with enforcing c. a police regulation in the narrower sense of requiring the construction of a fence on the railroad right of way. The railroad sought to escape liability, on the ground that it was "in the hands of a receiver" under

an appointment of a court of competent jurisdiction with full power to operate such road to the exclusion of its employes. The court says:

> "The action is against defendant for the nonperformance of a duty imposed by statute, against which, it is apprehended, no order of a court can avail to relieve it. It is a police regulation to which the corporation is subjected by the sovereignty of the state, and it is not within the rightful jurisdiction of the court, either state or federal, to arrest its operation. Notwithstanding the appointment of the receiver, the corporation is clothed with its franchises, and such corporation still exists. The effect of the appointment of the receiver is simply to give him the temporary management of the railroad, under the direction of the court, instead of the manager appointed by the directors of the corporation. It is that, and nothing more. * * * It is a principle well understood that all railroad or other corporations transacting business in its nature public are subject to all reasonable police regulations deemed necessary for the common welfare. The mere fact its property may be temporarily in the hands of a receiver does not relieve a corporation from the operation of such regulations, any more than a private citizen is released from the duty to observe the law because his property may be sequestered by the order of a court for the benefit of his creditors."

4. Analogy to the powers of the alien property custodian.

Section 12 of the trading with the enemy act of Congress, approved October 6, 1917, defines the powers of the Alien Property Custodian, as follows (See Clark on Receivers, p. 1219):

"The alien property custodian shall be vested with all of the powers of a *common-law trustee* in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, and, acting under the *supervision* and direction of the President, and under such rules and regulations as the President shall prescribe, may *manage* such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded."

The language used in this act is just as general and just as broad in its results, in our opinion, as the socalled wire control bill, except that it specifically states that the custodian is to have the powers of a common law trustee. It also provides, however, that he is to act under the supervision and direction of the President and under such rules and regulations as the President shall prescribe. Assuming that the custodian had come into possession of a telephone system by virtue of this act, could it be successfully argued that either he or the President had the power to fix the rates, by virtue of the language, "supervision and direction of the President" and "rules and regulations as the President shall prescribe?" Here we have the use of the apt term "regulations," and yet, to our mind, it could not be said that this gave the power to fix rates. The property, in either case, has come into the government custody in the exercise

of exactly the same so-called "war power," but there is no relation in either act between the necessities and the requirements of the real situation and the regulation of rates, and we think that such power was no more conferred in the one case than in the other.

5. Power to fix rates granted in express terms in other cases.

We find that section 582 (U. S. Comp. St. 1918, Compact Edition), prescribing the duties of the postmaster general, provides:

> "It shall be the duty of the Postmaster General:
> * * *
> "Ninth. To superintend generally the business of the department."

Superintend and supervise, we take it, are absolutely identical in meaning, and supervision is the act of either superintending or supervising. But under the use of this phrase, which is identical with the one employed in the present case, the postmaster general does not have the power to fix the rates of postage.

We find that he does have that power with reference to telegraph rates. Title LXV of the Revised Statutes relates to telegraphs. This act in its original form (see sec. 10076, R. S. 5267) was entitled, "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes." Sec. 10075 (R. S. 5266) provides that—

> "Telegrams between the several Departments of the Government and their officers and agents, in

their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, *at such rates as the Postmaster General shall annually fix.*

Subsequently, an act was passed August 7, 1888, and Congress again industriously wrote into the statute the proviso:

"Nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in the United States, or any authority that the Postmaster General now has under title sixty-five of the Revised Statutes *to fix rates*, or, of the Government, to purchase lines as provided under said title, or to have its messages given precedence in transmission."

Congress made use of abundant phraseology, employing the terms, "supervision," "possession," "control," and "operation." Had it intended to include the rate making function, it would have used the simple expression, "to fix the rates." That the act of fixing rates is an act of regulation is, of course, commonplace. We find that the Interstate Commerce Commission is created by "The act to regulate commerce."

U. S. Compiled Statutes, 1918 Edition—

Sec. 7707. Regulation of Commerce and Navigation.
Sec. 8057. Regulation of Vessels in Domestic Commerce.
Sec. 8151. Regulation of Steam Vessels.
Sec. 8277. Regulation of Motor Boats.
Sec. 8563. Regulation of Common Carriers of Interstate and Foreign Commerce.

Sec. 3115–⅛kk. Giving the President power to fix price of wheat. Specifically confers that power.

Sec. 3115–⅛q. "President * * * authorized to fix the price of coal and coke."

Possibly no more significant illustration of the practice of Congress could be given than in the "Act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes," approved July 18, 1918, two days after the passage of this act, in which it is provided by sec. 6:

"That the President shall have power to determine, prescribe, and enforce reasonable freight rates and the terms and conditions of affreightment which shall govern the transportation of goods on vessels of the United States, which shall be filed with the United States Shipping Board and open to public inspection. It shall be unlawful to charge or collect any compensation for the transportation of goods on any such vessel, or to enforce or attempt to enforce any terms or conditions of affreightment, or to make or receive any payment or do any act with respect to such transportation, not in accordance with the rates, terms, and conditions so prescribed, anything in any contract, whether heretofore or hereafter made, to the contrary notwithstanding."

Section 7431aa, which relates to the transportation of mail matter by urban and interurban electric railway common carriers, was enacted July 2, 1918. This would seem a matter peculiarly appropriate to leave to the postmaster general, and yet we find Congress providing:

"The Interstate Commerce Commission is here-

by empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of mail matter."

So that Congress was perfectly familiar with the term and had frequently employed it with definite significance, and had rate regulation been intended, that purpose would have been naturally and ordinarily accomplished by using those two words in the portion of the act conferring powers upon the President.

6. Proviso specially reserves rate making power to the states.

But we are not left to the necessity of judicial determination in any given case as to whether the intrusion into the domain of state regulation of intrastate rates is "needful or desirable" for the "national security or defense." Congress has industriously, and as we think, in a spirit of abundant caution to insure the resolution from attack as unconstitutional because in conflict with the tenth amendment, indicated that it did not intend to interfere in general with the police power, or police regulation, or rate regulation of the states. The resolution concludes with this proviso:

(a) Language used.

"That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers or regulations may

affect the transmission of government communications, or the issue of stocks and bonds by such system or systems."

(b) Purpose to insure constitutionality.

It is our judgment that probably this was unnecessary, and a mere confirmation of what the court would have held the law to be, in the absence of any proviso at all, and as we suggest, its primary office was to insure the constitutionality of the resolution.

Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, at p 242:

> "As said by Mr. Justice Story, in *Minis v. United States*, 15 Pet. 423, 445:
>
> " 'The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generalities, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview.' "

This case is cited with approval in *Austin v. United States*, 155 U. S. 417, 431, and in *White v. U. S.*, 191 U. S. 551.

> "*Ann. Cas.* 1912C, 1088. Note: "The word 'provided,' as used in a statute generally implies a limitation or restriction upon what has preceded in the context."

Such, we think, is the effect of the proviso here, "to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

(c) Regulation of telephone rates included in "police regulation."

Regulation of telephone rates is an exercise of the police power of the state, consequently a police regulation, and therefore excepted by the proviso.

Note, Ann. Cas. 1912D, p. 308:

"A telephone company is engaged in a 'business affected with a public interest,' and the state in the exercise of its police power may regulate the rates and charges of such company, and provide a maximum rate which the charge shall not exceed, provided that the rate prescribed is reasonable. *Chesapeake, etc. Telephone Co. v. Manning*, 186 U. S. 238, 22 S. Ct. 881, 46 U. S. (L. Ed.) 1144; *Cumberland Telephone, etc. Co. v. Louisville*, 187 Fed. 637; *Hockett v. State*, 105 Ind. 259, 5 N. E. 178, 55 Am. Rep. 201; *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Johnson v. State*, 113 Ind. 143, 15 N. E. 215; *Central Union Telephone Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Pioneer Telephone, etc. Co. v. Westenhaver*, 29 Okla. 429, 118 Pac. 354; *State v. Superior Ct.*, 67 Wash. 37, 120 Pac. 861. See also *Munn v. Illinois*, 94 U. S. 113, 24 U. S. (L. Ed.) 77; *Nebraska Telephone Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113."

(d) The use of the phrase, "the issue of stocks and bonds by such system or systems."

The argument has been made that the term "police power" has two meanings: (1) The ordinary narrow, restricted meaning which has to do with matters concerning the public health, public morals, and public safety; (2) the broad police power which has been sometimes characterized as coextensive with the power of government itself. While conceding

that police regulations are to be treated as synonymous with the expression of police power, it is insisted that, in this act, the term was used in its ordinary or narrower sense, and that the proviso reserved to the states only the exercise of such lawful police regulations as might affect the health, safety, and morals.

It is elementary, of course, that meaning must be given to ever yphrase and sentence in the act, and when we find that Congress has industriously written into the act the proviso that lawful police regulations are reserved to the states, except wherein they "may affect * * * the issue of stocks and bonds by such system or systems," we are confronted at once by the proposition that whatever power of police regulation was intended to be preserved to the state by the proviso was one which, in legislative contemplation, necessitated an exception so as to make it inapplicable to the "issue of stocks and bonds by such system or systems."

The issue of stocks and bonds, of course, cannot in any way be affected by regulations that have to do with the public health or the public safety or the public morals, unless, of course, argument should be made that such restraint as might exist to prevent the exercise of fraud—that is, the criminal jurisdiction of the state—was to be suspended in behalf of the postmaster general. It will not be seriously contended, we think, that Congress had any such idea in mind. Obviously, what it had in mind was the provisions found in public utility statutes quite generally, and which are embodied in sections 1753—1 to 1753—22, Wis. Stats., which provide for application to the railroad commission

and the issue of a certificate of authority stating the amount of such stocks, purposes for which they are issued, etc., and provide for the ascertainment of the value of the property of the utility, preliminary to the issuance of such certificate. This, we submit, most obviously was the character of police regulations that Congress had in mind, and it requires no argument, of course, to establish that this matter of regulation and supervision of the issue of corporate securities stands upon exactly the same footing and is referable to that broad form of the police power under which the power to regulate rates is derived.

The preliminary investigation preceding the fixing of a rate, and that preceding the authorization of stocks and bonds, are substantially the same. In the one case (1753—9, subsec. 2 to 1753—9, subsec. 8), it may make a true valuation of the property preliminary to authorizing the issue of stocks and bonds, while 1797m—5 provides for such valuation as a basis for the determination of reasonable and just rates. So that if the power to regulate the issue of stocks and bonds had remained unimpaired up to the insertion of this exception in the proviso, it must unquestionably follow that the power to regulate rates had been preserved up to that point, because the two species of regulation are absolutely referable to the same classification of power. The power reserved could not have been broad enough to authorize the valuation of property with a view of determining the amount of stocks and bonds that might be legitimately issued, without, as a necessary corollary, having been broad enough to preserve exactly the same species of power predicated upon an

almost identical procedure under which the state regulated the rate of return upon the utility.

We have therefore, in this concluding sentence of the resolution, an express declaration that, in the contemplation of the framers of the law, up to the point where this exception was inserted in the resolution, the fundamental residuum of police power in its very broadest sense, under which it is agreed the power to regulate rates arises, had been left unimpaired and undisturbed in the inherent possessors of that power—the states.

7. The debates in Congress disclose that the evil against which both the telephone and telegraph and the railroad acts were directed was not the evil of diverse state regulation.

We are entirely disposed to agree with the Solicitor for the Post Office Department that "The circumstances in which it was enacted and the ends and aims it was to subserve are all-important factors in determining its meaning." What, then, were the circumstances surrounding the enactment of the legislation? To ascertain them we have under elementary rules the right to consult the debates in Congress to ascertain the evil which the legislation was designed to correct—the circumstances in which it was enacted. These debates are not, of course, controlling as determining "the meaning of that language of a statute passed by that body."

It has been repeatedly held, however, that such

debates may be consulted for the purpose of ascertaining the evil which the legislation was designed to correct. Declarations of this rule are frequent.

(a) Authorities permitting examination of debates

Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6, at p. 546.
Jennison v. Kirk, 98 U. S. 453, 459, 25 L. Ed. 240.
Roberts v. Southern Pac. Co., 186 Fed. 934, at p. 938.
Wadsworth v. Boysen, 148 Fed. 771, at page 778.
American Net & Twine Co. v. Worthington, 141 U. S. 469, 473.
Standard Oil Co. v. U. S., 221 U. S. 1, at p. 50.
Tap Line Cases, 234 U. S. 1, p. 27.
In re Gerdau, 54 Fed 143, 145.
Rector v. U. S. 143 U. S. 457, 12 Sup. Ct. 511, 513.
Shallus v. United States, 162 Fed. 654, h. n. 5.
United States v. Chicago & N. W. Ry. Co., 157 Fed. 616, 618.
United States v. Board of Commissioners of Osage Co. Okl. et al., 193 Fed. 485, 486, h. n. 6.
Black on *Interpretation of Laws*, 2d ed., Contemporary History, 285.

(b) The history of the wire control act.

This was first introduced as a joint resolution by Mr. Aswell, June 27, 1918, page 9080, Congressional Record, referred to the Committee on Interstate and Foreign Commerce. Page 9368, July 2nd by unanimous consent the resolution was transferred to the Committee on Military Affairs.

9378—Motion was made to reconsider this action

by the chairman of the committee to whom it was originally referred and after debate, this was agreed to; and on reconsideration, the matter was left with the original committee (9380).

On July 4, page 9411, the resolution was reported with an amendment. The discussion of the measure commenced July 5th. At page 9465, the original resolution and the amendment are set out in full. The same follow:

"Joint resolution (H. J. Res. 309) to insure the continuous operation of electrical communicating systems, to guard the secrecy of war dispatches, and prevent communications between public enemies.

"*Resolved, etc.*, That the President, if in his discretion it is deemed desirable, in order to insure their continuous operation, or to guard the secrecy of military and governmental communications, or to prevent communication by spies and other public enemies thereon, or for other military or public reasons, shall have power to take possession and control of any telegraph, telephone, marine cable, or radio systems, and operate the same subject to those conditions of law, so far as applicable, which are in force as to steam railroads while under Federal control.

"Also the following committee amendment was read:

"Committee amendment: Strike out all after the enacting clause down to and including the word 'control,' in line 4, page 2, and insert in lieu thereof the following:

" 'That the President in time of war is authorized and empowered to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the dura-

tion of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace:

" '*Provided*, That just compensation shall be made for such supervision, possession, control, or operation.' "

(a) Debates disclose that evil to be remedied was not regulated by state commissions.

During the course of the debate, Mr. Esch offered the amendment as it now stands, relative to compensation, stating that it was the language in the bill giving "the power of taking over the ship yards" (page 9466).

On the same day, July 5, 1918, (See Congressional Record, page 9473), the last part of the resolution was introduced by Mr. Montague.

Mr Sims said (Congressional Record, July 5, 1918, p. 9475):

"But looking at the resolution, which is in the exact language, word for word, of the act of 1916 under which the railroads were all taken over, and then considering the great railroad-control bill as we did for many weeks, in which every question pertaining in nature and substance to this resolution was discussed, I thought it would be an assumption on my part to repeat at great length in a report information which everybody knows. * * *

"I am not prepared to say that it will not become necessary, but I hope it will not become necessary, and if it does not it will not be done. Therefore there was no use in a long program of detailed legislation as to the operation, as to the compensation, in advance of whether or not it would ever become necessary to consider such legislation. If it is found necessary by the President to exercise the

power herein conferred, as a matter of course Congress will do as it did in the railroad-control matter. There will be supplementary legislation to take care of every question that will arise, and it will not be railroaded through the House without ample time for consideration."

"I do not think there is the remotest possibility of the Government taking supervision because they are now supervised by different States." (P. 9477.)

At page 9478 the proviso was read again by the clerk and the following question and answer appear with reference to it:

"MR. ESCH. Is that language the language of the railroad act?

MR. MONTAGUE. It is, except that the language of the railroad act is 'transportation of troops, war materials, and Government supplies.' Of course, that language is inapplicable to this bill, and I simply used the language "Government communications,' which would embrace all communications by wire or telephone."

And again it was stated:

"MR. MONTAGUE. Does the gentleman carry in his mind the distinction between regulation and limitation? We in this committee have not brought in any measure of a regulatory character. The amendment that I proposed is simply an amendment of limitation and preservation of existing powers."

At 9479, we find the interesting statement in response to the suggestion which has been urged in other arguments, that the President already had the power:

"MR. SIMS: I think I can suggest a fair approach

to an answer to the question whether or not the President has the power contained in this resolution, that it was submitted to the Department of Justice and after a thorough investigation and study the Department of Justice reported to the President that he did not have the authority."

At page 9481, the title was then amended by unanimous consent to correspond with the resolution.

The matter came up for consideration in the Senate in its amended form (July 6, page 9502), and under its present title was referred to the Committee on Interstate Commerce. On July 8th, page 9610, it was reported back with recommendation, after consideration of a little over an hour (9611).

On page 9614, we find the suggestion made as to the possibility of a strike. It was stated at 9614 by Mr. Penrose:

"Mr. President, I do not think in the history of any legislative body from here to Russia has a more high-handed proceeding been perpetrated than that which we have witnessed this afternoon. I speak coolly and advisedly, although my indignation runs high. We are supposed to be in a battle for liberty and to be engaged in a tremendous conflict to bring about the downfall of autocracy, and yet here in the Senate of the United States every principle of orderly constitutional procedure and of liberty has been outraged and violated."

And at 9617, it was referred back to the committee. On July 10th, Congressional Record, page 9685, it was again reported and read by title. At 9729 on July 11th, the matter was again brought up for consideration. Reference was made by Mr.

Smith to the question of tolls in the following language and upon possible abuse:

"The question of tolls and rental and hours of service is very important to the telephone patrons, and any unnecessary interference with present plans should have the most careful consideration."

This discussion was resumed on July 11th, page 9732. It was stated at 9733 by Mr. Underwood.

"I will say to the Senator from Ohio that so far as I know there is no emergency which exists in this hour for this legislation. That is the reason why I did not think there were any hearings necessary."

And again at 9735, a colloquy took place between Mr. Harding and Mr. Underwood:

"MR. HARDING. I want to ask the Senator from Alabama if he will not admit, however, that the public-service utilities, which he is proposing to give authority to take over, are already essentially under license and control on the part of the various public utilities commissions throughout the States?

"MR. UNDERWOOD: Well, I think they are throughout the States; and that very fact might hamper the hands of the Federal Government.

"MR. HARDING: Now, if the Senator will tell the Senate how it will hamper the Government, we shall be obliged to him.

"MR. UNDERWOOD: I do not know how it would; I can not answer that question definitely; I say that it might; I do not say that it would; but the fact that those companies are regulated can not affect the situation."

And again at 9736 Mr. Underwood said:

"But I do not think there is any probability whatever of the taking over of the telephones in

this land, except it might be to meet a local situation in some seaport for the moment or the hour; but so far as taking over the telephones of the country is concerned, permanently or in any large class or as a system, I do not think there is any possibility of it."

On the same page a communication from Mr. Burleson is reproduced which says:

"At this moment the paralysis of a large part of the system of electrical communication is threatened, with possible consequences prejudicial to our military preparations and other public activities that might prove serious or disastrous."

And this danger is characterized by Mr. Reed:

"That the emergency now exists in the threatened strike."

9746—July 12th, an amendment was introduced by Mr. Reed. Page 9749, it was stated:

"That the genesis of this proposition is at the Post Office Department, where they hope, under the present exigency, to give it force and effect. I think they are making use of this extraordinary situation to get control of these great arteries and avenues of communication."

At page 9755, letters and telegrams were introduced tending to demonstrate that there was no danger of a strike among the telegraph employees. At page 9801 the speech of Mr. Kellogg on July 11th appears. At 9850 under date of July 13th Mr. Reed states:

"If then the Government should tomorrow take over these utilities and there is no clause written

into the law which will perpetuate the legal right of the citizen to this service, any citizen can be refused that service and he is totally and absolutely without redress, first, because the public use has been absorbed in the sovereignty itself and, second, because he can not sue that sovereignty. Nobody can sue the United States of America except where Congress has expressly granted that permission."

To which Mr. Shields, reading the resolution, replied:

"Now, the question I wish to ask is, Are not the rights of the citizens of which the Senator speaks protected by the provision that this measure shall not be construed to amend, repeal, impair, or affect existing laws referring to taxation or the local police regulations of the several States? Is it not a fact that the right of the general public to be served by public utilities, such as common carriers, hotels, telegraph companies, and telephone companies, comes under the police regulation? Are not all the laws, both common and statutory, governing these public utilities police regulations, and must not the public utility render this service, and is not that preserved in the bill?"

At 9851, Mr. Reed stated further, with reference to his proposed amendment:

"But let us assume that the Senator from Tennessee is right, I do nothing in this amendment but reaffirm and reassert a right and make it clear.

"When these utilities are taken over the administration of their business affairs will be turned over to a vast multitude of men. It almost always happens that some men put into public position become more or less arbitrary, and if they are under no restraints whatever great damage and injury may be done."

At the same page, Mr. Knox stated:

> "It is only written into the resolution that which is approved as a matter of course. It is not a right in my judgment that rests in the police power. It is a right that grows out of the nature of the service that these corporations offer to render to the general public, and we are only writing into the resolution a proposition that in our opinion no operations of these lines, if they are taken over by the Government, will interfere with that natural right. The amendment contemplates and specifically provides that in any situation where the private right and the Government right conflict the private right must give way."

The amendment was rejected by a vote of 27—for and 32 against, 37 not voting. The joint resolution itself was adopted on July 13th, page 9852.

This detailed history of the resolution and its passage is presented, not at all upon the theory of demonstrating what the intention of Congress was, because we think the reference to the debates lends peculiar emphasis to the proposition of their untrustworthy character as a guide to the intention of the legislative body. We find that while there was discussion on the matter in question, Mr. Reed thought it necessary to pass an amendment to insure the citizens' rights; Mr. Shields thought it unnecessary because they were already provided for by the term "police regulation" and Mr. Knox stood for the view that the amendment would only write into the resolution that which was approved as a matter of course.

It is, of course, absolutely beyond human power to determine which view governed the action of Congress, in either house, in adopting the resolution; but

this much does appear: that while a sort of nebulous military necessity was suggested, the exact nature of which no one seemed to be able to find and which all apparently agreed did not exist at the time that the bill was under consideration as a reason for its adoption and that the fact that a strike was threatened was touched upon as a reason for adopting the resolution, throughout the entire debate, discussion and proceedings that have to do with the resolution, there is neither phrase, syllable or suggestion in the remotest possible way indicating that state regulation of rates was a reason for passing the bill. Mr. Underwood in a vague way suggested such interference as a possibility without apparently indicating in what respect it might arise.

8. Argument based on the analogy to control exercised over railroads.

(a) Act for wire control is in pari materia with railroad bill.

It will be admitted that the Federal control of transportation and the same control of the wire communicating systems both relate to the same general subject matter. This, we think, follows from whichever one of several standpoints the matter may be considered. The terms of the rail act authorize the President "to take possession and assume control of any system or systems of transportation" in time of war "for the transfer or transportation of troops, war material and equipment, or for such other pur-

poses connected with the emergency as may be needful or desirable." (Vol. 39, Statutes, p. 645.)

As above set forth, the joint resolution for wire control states that the President, during the continuance of the present war, is authorized, "whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control * * * and to operate the same in such manner as may be needful or desirable for the duration of the war."

The Presidential Proclamation, in the case of assumption of control of the transportation system recites:

> "It has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion, as far as may be necessary, of other than war traffic thereon, for the transportation of troops, war material, and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war."

The Proclamation assuming control of the wire systems uses the language:

> "It is deemed necessary for the national security and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable."

(b) Rule stated permitting examination of statutes in pari materia or on merely cognate subjects.

In other words, it very clearly appears that the two acts and the proceedings thereunder are related to the

general subject of the national security and defense. In another aspect, they are likewise in pari materia, as having to do with the general subject of the Federal operation and control of public utilities. They are upon the same general subject, in the sense that they deal with the question of interstate commerce, and its regulation with reference to the powers of the states over intrastate commerce. But even though the court should conclude that they are not strictly in *pari materia*, it is very clear that they relate to cognate matters; and whether they are strictly in *pari materia* or merely cognate, under authorities that govern construction established by this jurisdiction and by the supreme court of the United States, they may be referred to.

Smith v. People, 47 N. Y. 330, p. 339:

> "Statutes in *pari materia* relate to the same subject, the same person or thing, or the same class of persons or things, and are to be read together, for the reason that it is to be implied that a code of statutes relating to one subject is governed by the same spirit, and are intended to be harmonious and consistent. They are to be taken together as if they were one in law, as one statute."

Munger v. Lenroot, 32 Wis. 541. Two statutes giving liens on logs although enacted at different sessions and relating to two different sets of counties were characterized by the court as follows:

> "These statutes relating to laborers' liens are in *pari materia* and we may look at one to discover the true interpretation of another."
>
> *Com. v. Ross*, 122 S. W. 161, 135 Ky. 315.

Endlich on the Interpretation of Statutes, 43, 51.

36 *Cyc.* 1147:

"Statutes in *pari materia* are those which relate to the same person or thing, or to the same class of persons or things."

Helm v. City of Grayville, 79 N. E. 691:

"In arriving at the proper construction to be given a statute, other statutes relating to the same subject should be considered. 'Statutes are in *pair materia* which relate to the same person or thing or to the same class of persons or things, and the phrase is applicable to public statutes or general laws made at different times and reference to the same subject.' 26 Am. & Eng. Encyc. of Law (2d Ed.) 621; *South Park Comrs. v. First Nat. Bank*, 177 Ill. 234, 52 N. E. 365; *Stribling v. Prettyman*, 57 Ill. 371."

Indianapolis Northern Traction Co. v. Ramer, 76 N. E. 808, 810:

"The rule of construction by the aid of statutes in *pari materia* does not restrict the court to the consideration of other legislation enacted on the same day or at the same session. The use of the rule, like all other methods of construction, is to ascertain the intention of the legislature by reference to other enactments relating to the same matter or subject—to the same person or thing, or to the same class of persons or things."

The application of the rule and the classification of legislative acts, no more closely related than here, as appertaining to the same general subject matter within the meaning of this rule, are further illustrated by the following cases:

In re Ryan's Estate, (Mo. App.) 156 S. W. 759;
Converse v. The U. S., 62 How. 463;
State v. Esser, (Nev.) 129 Pac. 557;
Westport Stone Co. v. Thomas, (Ind.) 94 N. E. 406;
Greenbush Cemetery Ass'n v. Van Natta, (Ind.) 94 N. E. 899;
State v. Eggers, (Nev.) 136 Pac. 100.

Sutherland Statutory Const.: "Statutes upon cognate subjects may be referred to, though not strictly in *pari materia*."

State v. Summers, 44 S. W. 797:

"Even cognate statutes, though not strictly in *pari materia*, may be invoked and referred to in order to elucidate the legislative intent. Suth. St. Const. 283, 284; *Ex parte Marmaduke*, 91 Mo. 257, 4 S. W. 91."

Schmidt v. Raymond, 148 Wis. 271, 274, construing the effect of the statutory provision for curtesy to a husband in a deceased wife's estate, provisions on the cognate subject of dower were considered: "It is quite significant that, while sec. 3885, Stats. (1898) provides for the admeasurement of dower, in the event of it being necessary to sell the lands of a deceased husband to pay debts, no such provision is found in regard to curtesy. If the legislature had considered that the rights of the husband by curtesy took precedence over the claims of the creditors, no doubt a provision would have been made for the admeasurement of curtesy as well as of dower."

State v. Beck, 21 R. I. 288, 43 Atl. 366, 45 L. R. A. 269:

"A familiar rule in the construction of statutes is that a statute must be construed with reference to the whole system of which it forms a part, and that statutes upon cognate subjects may be referred to though not strictly in *pari materia.* Sutherland Stat. Const. 284."

Smith v. People, 47 N. Y. 330, 339:

"So in case of doubt or uncertainty, acts in *pari materia*, passed before or after, and whether repealed or unrepealed, may be referred to in order to discern the intent of the legislature in the use of particular terms; and within the same rule, and the reason of it, contemporaneous legislation, although not precisely in *pari materia*, may be referred to for the same purpose."

Wnitcomb v. Rood, 20 Vt. 49:

"But when terms or modes of expression are employed, in a new statute, which had acquired a definite meaning and application in a previous statute, on the same subject, or one analogous to it, they are generally supposed to be used in the same sense; and in settling the construction of such statute, regard should be had to the known and established interpretation of the old."

State v. Woodson, 31 S. W. 105, 128 Mo. 497:

"Statutes not strictly 'in *pari materia*'—statutes on cognate subjects—may be brought within range of the construing vision as needed auxiliaries in the work of interpretation."

Cummings v. Everett, 19 Atl. 456:

"The whole body of previous and contemporaneous legislation should be considered in interpreting any statute."

Endlich Interpretation of Statutes, Sec. 52, p. 65:

"The construction which has been put upon acts on similar subjects, even though the language should be different, should for a similar reason be referred to."

26 *Am. & Eng. Encyc.* 623:

"Contemporaneous legislation, not precisely in *pari materia* with the statute to be construed may be referred to on the question of intent."

Vane v. Newcomb, 132 U. S. 220, quotes this language at 236 from *Stout v. Board of Coms.*, 107 Ind. 343, 348, which makes use of it and in turn refers to the earlier case of *Prather v. The Jeffersonville, Madison and Indianapolis R.*, 52 Ind. 16, where it originally appeared. *Chase v. Lord*, 77 N. Y. 1, 18, employs almost the same words. *Matter of Rochester Water Coms.*, 66 N. Y. 422, as does *People v. England*, 91 Hun 152, 155: "Where other acts of the legislature, passed at or about the same time, corroborate the evidence of intent, as gathered from the statutes under review, the duty of the courts is to give effect to the intent rather than to the literal terms of the act."

State v. Wiggins Ferry Co., 106 S. W. 1005, quotes with approval from Sutherland that "statutes on cognate subjects may be referred to," as does *State v. Patterson*, 105 S. W. 1048.

Under elementary rules where a statute or part thereof, adopted from another state or re-enacted in a subsequent statute in the same state, has received a prior construction, such construction is binding

upon the court in its interpretation of the statute so adopted from a foreign state or re-enacted from the body of statutes previously existing. We contend that the reason of this rule sustains this proposition —that where the language of a statute having to do with the same general subject matter is subsequently taken over in substance and in form in another enactment, in case the first enactment has not received definitive interpretation by legislative construction or by the court, in interpreting the second or subsequent enactment, the court will have the right to examine into the facts and circumstances and the general situation surrounding the enactment of the first provision with a view of ascertaining what the particular evil was that the legislative body sought to remedy by the insertion of the particular phrase—and has a right to resort to all legitimate aids in enabling it to arrive at a correct interpretation of the meaning and intent of the first of the two provisions, whether intrinsic in the language employed, or extrinsic thereto, in order to enable it to properly interpret the second enactment in the light of and with the aid of such assistance as would have been available and as would have enabled the court to put a proper construction upon the language of the statute furnishing the source for the enactment in question.

(c) Railroad legislation summarized.

The first provision relative to control of the railroads is found at page 645 of Vol. 39 of the Statutes,

the same being the revenue bill passed by the 64th Congress on August 29, 1916.

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The authority conferred by this proviso was not exercised until the Presidential proclamation of December 26, 1917, which provided that—

"* * * The possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.

"Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or

any part thereof may be situated. But any orders, general or special, hereafter made by dais director shall have paramount authority and be obeyed as such."

Following this, and under date of March 21, 1918, the 65th Congress provided for the ascertainment of just compensation for the carriers taken, providing a revolving fund of five hundred million dollars for the purpose of paying the expenses of the federal control, and, so far as necessary, the amount of just compensation. Section 10 expressly provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. * * *

"That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time

of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition."

Section 15 provides:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

(d) Interpretation of railroad act.

The foregoing would appear to demonstrate very clearly that by the terms of the original Presidential proclamation, the railroads were kept expressly subject to "all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions." The act of March 21, 1918, varied this only to the extent of conferring upon the President the power to initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, while section 15, which provides that "nothing in the act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States," is merely

declaratory of the presidential purpose that such systems of transportation should remain subject to all statutes and orders or regulating commissions of the various states, in which said systems or any part thereof may be situated, with a proviso that the orders of the Director should "have paramount authority and be obeyed as such." In other words, the net effect of the provisions covering the railroad situation was: first, to leave them expressly subject to the control of state commissions and the Interstate Commerce Commission, and, secondly, to give the President authority to initiate interstate rates; but in our opinion, by legislative silence on the subject, to deny him the power to initiate intrastate rates, and by express declaration to re-affirm the policy of leaving the roads subject to the police regulation of the states—clearly used as inclusive and synonymous with the expression used in the Presidential Proclamation of "*regulatory commissions.*"

The foregoing provisions amply demonstrate the contention that we make, that whatever results that were sought to be obtained, were to be accomplished through the medium of speeding up railroad operations from the standpoint of their internal management, and that the status quo, so far as existing laws and arrangements were concerned, was to be disturbed just as little as possible, and only in the specific particulars provided by the Presidential Proclamation and the act of Congress.

(e) The evil sought to be remedied by Congress, as discussed in the hearing before the Interstate Commerce Committee of the United States Senate prelimary to the passage of the bill under which the President received the power to initiate railroad rates.

Prior to the enactment of the legislation of March 23, 1918, the situation of the railroads under the act of Congress and under the proclamation of the President was akin, at least, to the situation of the telephone companies at the present time, and Congress in enacting this legislation had before it the committee hearing on the matter.

It appears at page 499 of the hearing on government control and operation of railroads, pursuant to S. Res. 171:

"Commissioner ANDERSON. I think the power to fix rates, either under the interstate-commerce act or under any State act, has already been taken away, so far as the assertion of the war power of the President under the act of August, 1916, makes reasonably necessary, and that section 11 carries forward precisely the status which I think now exists."

And at p. 751:

"Senator KELLOGG. While the roads are being managed by the Government itself, as a Government institution, do you think the State commissions should be allowed to fix any parts of the rates on the Government property?

"Mr. WALTER. I do, Senator, for this reason: I do not understand that the Government has taken possession of the railroads as it would take possession of a piece of property and erect a build-

ing thereon. My thought is that all the possession they have is the possession to operate the freight thereon, and that you leave to the Interstate Commerce Commission and to the State commissions the exercise of all functions not in conflict with the exercise of the power of movement."

Again, at p. 752:

"Senator KELLOGG. * * * Of course that possession has been taken through the various corporations, but if the Government has the constructive possession of the railways of the country and is operating them as a Government institution, do you think any power except the Federal power should fix the rates and direct the operation of lines in the country?

"MR. WALTER. Viewing the conditions as they are now, I will say yes, that the State commissions ought to be preserved, for these reasons, Senator, if you will permit me a little bit of a long answer. In the first place, it takes a man with some experience and judgment to determine what the reasonable rate is. The State commissions are just as patriotic, as energetic and as desirous of proper results as anybody else. I would leave to them the exercise of their power."

Mr. McAdoo testified before the committee (pp. 843–844):

"The President's proclamation has expressly left that status unimpaired except to the extent that it may be determined in the public interest to alter it from time to time. As it stands to-day the State commissions are exercising precisely their same functions. The Interstate Commerce Commission is exercising its same function, and, for my own part, I think as little disturbance should be made as possible in those matters; yet, at the same time, it is very essential that the President should exercise

his full powers as the public necessity requires. * * *

"It is not only a question of the amount of the rate, but of the effect of the rate upon different communities. Those rates have relation to the economic status and the industrial activities of the country. I think that any man who undertook lightly to disturb that rate structure would be doing a very foolish thing, and naturally the President would not undertake to exercise the power he has under the law to destroy or disturb rates lightly or unnecessarily.

"As I said to the State commissioners who called on me the other day, the ordinary procedure will continue to be observed; that the advice and suggestion and assistance of these commissions could be made of great value in the management of the railroads; that the purpose of the President was and is not to exercise any power he possesses to override the authority of the Interstate Commerce Commission and various State commissions except in cases where it is clearly necessary to do so to meet the war emergencies or to serve the public interest."

Mr. Cowan testified at p. 1148:

"I say, therefore, that if a railroad company, or any other carrier, or Congress, or the State legislature, shall impose a charge above what is reasonable, it is in the nature of a tax. It is unlawful, it is not the standard that the shipper is reasonably entitled to, it is not the standard which the public is entitled to, the railroad has no right to exact more, and the shipper is obliged to pay that.

"* * * I say, therefore, that the suggestion that has been made—and I may parenthetically remark that it is an astonishing proposition to me, coming from the source that it does—that under this bill the President, the Director General, or whoever executes this law might raise the rates

for the purpose of producing revenue for the Government. In other words, exercise the taxing power, if they raise it beyond what is reasonable."

(f) Discussion of bill in Congress.

The bill was presented in the Senate February 11th (see p. 1939, Congressional Record). At 1944 it was stated by Mr. Smith, who had charge of the same:

"The bill under consideration was drafted by the administration and modified by the Interstate Commerce committee of the Senate to meet the situation."

In presenting his summary of the bill to the house, Mr. Sims, who apparently had charge of the same for the administration, stated in the house on February 19, 1918, at page 2337:

"On the other hand, it is manifestly impracticable and undesirable for the President or any agencies he may create to readjust our present rate fabric. Comparatively little of it ought to be readjusted, and such necessary adjustment should come tentatively and only to meet obvious needs. Our committee was of the opinion that section 11 meets the situation in the least objectionable and in the most practicable way. It provides that, except as the President may from time to time otherwise order, rates shall continue to be and to be determined as hitherto.

"This leaves the Interstate Commerce Commission and the state commissions to proceed, precisely as hitherto, in the determination of all rate questions unless and until the President, in the exercise of the war power, shall order otherwise."

Vol. 56, Part III, 65th Congress, p. 2360, contains

a discussion by Mr. Snook of the clause relative to the authority to initiate and fix rates. And on that page appears an excerpt from the testimony of Mr. McAdoo before the committee, in which he states, as to intrastate rates, "I think that the state commissions ought to continue to consider such questions as they rise," and that in a conference he had told them that they should go ahead and hear cases and exercise their powers as theretofore, subject to the power of the President to override their decision when he thought it necessary to do so in the public interest, and stated: "It is therefore plain that there is to be no change in the present method of fixing rates, except in exceptional cases, and then only when an emergency arises making such course necessary."

Senator Underwood, February 20, p. 2377, Congressional Record, contended—

> "that the bill should not be passed unless within the folds of the bill remains the provision to allow the Interstate Commerce Commission to continue to functionate and review any rate that is put upon the people of this country from any source."

At page 2378, Senator Sherman objected to impairing or invading the power of the Interstate Commerce Commission.

Mr. Poindexter stated in the Senate (p. 2387):

> "It was the avowed purpose of the Director General not to interfere in general with the rate making duties and authority either of the Interstate or state commissions."

In referring to this section as "11," Mr. Sims obviously misspoke as the section then, as now was numbered 10 and is the same as printed above and practically identical with the section as finally enacted. At that time, however, there was nothing in the bill in any way corresponding to Section 15 thereof, quoted as above, as finally enacted, except that Section 13 of the act provided: "that nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the states in relation to taxation."

In this form the bill passed the Senate on February 21, calendar day, February 22, Congressional Record, Second Session, 65th Congress, Page 2519.

When the bill went into the House of Representatives it was amended by striking out everything after the enacting clause, making various changes therein, but the most significant was to present for the first time the equivalent of Section 15 as it now appears.

(g) Proposed amendment inserting in proviso the words "the regulation of rates."

Section 16 of the bill so amended provided:

"That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation, or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or Government supplies, *the regulation of rates*, the expenditure of revenues, the addition to or improvement of properties, or the issue of stocks and bonds."

This bill, as so amended passed the House of Representatives by a vote of 339 voting "aye," six voting "nay," one voting "present," and eighty-one not voting.

Following the passage of the bill as thus amended in the House, it appears at 2838 and 2839 that the House insisted upon its amendment, and arrangement was made for further conference upon the bill. Thereafter, conference committees were duly appointed, and the bill in its present form reported to both Houses, with the phrase "regulation of rates" omitted.

The conference report on the railroad bill was presented to the Senate, March 13, 1918, debated, and rejected on a point of order, which appeared to call for the discussion of the intent and effect of the proviso under consideration here.

The Vice-President stated (p. 3420, Congressional Record):

> "The Senate of the United States passed this proviso in this bill:
>
> " 'That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation.'
>
> "The House of Representatives, in the substituted bill, included that language exactly, and added to it:
>
> " 'or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or government supplies, the regulation of rates, the expenditure of revenues, the addition to or improvement of properties, or the issue of stocks and bonds.' "

Mr. Pomerene stated:

"It is true that one of the subjects of state control has been the question of taxation. The Senate adopted the provision as read. The House adopted that provision plus something more, namely, a limitation upon the power of the State over the subject of taxation. But that was not all. The House went further and said upon the subject of control, we are going to reserve to the States the power over the subject of taxation and *also the police power of the states* as theretofore."

At page 3432, Senate Bill 3752 was again submitted to the Senate by Mr. Smith, of South Carolina. The bill as finally adopted appears in the Record in full (pp. 3433–3435). From 3436 to 3443, there is a discussion of the bill, and the record of its adoption appears on that page, on March 13, 1918; but nothing in the discussion throws any further light on the intent and meaning of the proviso here in question. On the same date (3461–3462), conference report was presented in the House by Mr. Sims of the committee. At 3492, it was again called up by Mr. Sims. At 3495, March 14, there appears a statement presented to accompany the bill, in which it was said:

"The conferees agreed to strike out section 16 of the House amendment and substituted therefor a new section as set out in section 15 of the conference report. The substitute section provides that this act shall not be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to the lawful police regulations of the states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

At 3496, there is a significant and interesting statement not bearing on the question here, but in a general way bearing on the scope of the power conferred by Congress, made in the House by the chairman of the conference committee, Mr. Sims:

> "Mr. Speaker, if the order of the President violated the provisions of this act or was not authorized by it, it would be void, because he would have no authority to make it, and of course, any order made by him must be made in accordance with and in pursuance of the authority given him by the act of August, 1916, or by this act, and any order made outside of the authority conferred by those acts would be absolutely void."

At 3496, the following exchange of views took place:

> Mr. OSBORNE: "I call the attention of the gentleman from Tennessee to the explanation in the statement of the managers of section 15, page 11. That explanation is as follows:
>
> " 'The substitute section also provides that this act shall not be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to the lawful police regulations of the states—'
>
> "And so forth, leaving out the word 'taxation,' which appears in the section. Was that intended?"
>
> Mr. SIMS: "The act plainly exempts the states from any kind of control with reference to taxation. The other language that the gentleman refers to simply has reference to the police powers of the states."

Mr. Esch, also a member of the conference committee, speaking at 3499, said, as to the power of the President generally, and as to this section:

"With reference to the provision that was referred to here as to 'any order of the President,' I think that has been explained. We must interpret those words in the light of the section in which the words appear; and if so interpreted they will not give to the President this broad and unlimited power to repeal or suspend any statute of the United States or any statute of a state.

"*With reference to section 15, relating to the taxing power, we have practically gotten back to the house provision.*"

Thereupon (March 14, p. 3500), the conference report was agreed to.

(h) Use by Congress of "police regulation" includes "rate regulation."

We find then that there was the same general diversity of view of just what the net result of the various provisions of the bill might be but we think the phrasing of the amended bill as it first passed the House, conclusively sets at rest any doubt there may be as to the sense in which the term "police regulations" was used by Congress in both of the acts in question. *It was used in the sense of regulation of rates;* and the inference is that having omitted the phrase from both the Railroad Control Bill and the Wire Control Bill, it was expressly intended not to except the regulation of rates by the states from the terms of the proviso. We submit, in other words, that Congress understood and intended to use the words "police regulation" in these enactments, however they may have been intended in other enactments, in exactly the same sense as the Supreme

Court of the United States used those words. In the sense, for instance, in which they are applied in *Reagan v. Mercantile Trust Co.*, 154 U. S. at p. 417, where language substantially parellel to the proviso is used: "We are of opinion that the Texas and Pacific Railway Company is, as to business done wholly within the state, subject to the control of the State, in all matters of taxation, *rates and other police regulations.*"

Congress contemplated, to use the language of this court in the recent case of *Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U. S. 372, "rate regulation by a state in the exercise of its police power."

(i) Right to consult amendment in construing act.

So that, we think that this consideration alone disposes of all need of inquiry as to the meaning of "police regulations." It is a final demonstration that rate regulation is included within the power of police regulation preserved. That this amendment may be consulted to determine what Congress meant in the Railroad Act, and hence in the Wire Act, is, of course, obvious.

Sutherland, *Stat. Const.*, 470, p. 880.

"Amendments made, or proposed and defeated, may also throw light on the construction of the act as finally passed, and may properly be taken into consideration."

IV

PROVISIONS GIVING INTERSTATE COMMERCE COMMISSION POWER TO FIX TELEPHONE RATES NOT REPEALED; CONSEQUENTLY IT STILL RETAINS POWER, AND POSTMASTER GENERAL DOES NOT POSSESS IT, EITHER AS TO INTERSTATE OR INTRASTATE RATES.

1. Repeals by implication not favored.

The proper angle of approach to be assumed by the court in determining whether or not the so-called wire act has operated to suspend or repeal pro tanto the provisions of the statutes found under Title LVI A, entitled, "Regulation of common carriers of interstate and foreign commerce," is sufficiently illustrated in Black on Interpreation of Laws, Sec. 107, p. 351:

> "Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on the subject."

Numerous decisions of the Supreme Court of the United States fortify and sustain the rule.

Washington v. Miller, 235 U. S. 422, at 428:

> "In these circumstances we think there was no implied repeal, and for these reasons: First, such

repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (*United States v. Healey*, 160 U. S. 136, 146; *United States v. Greathouse*, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend v. Little*, 109 U. S. 504, 512; *Ex parte Crow Dog, Id.* 556, 570; *Rodgers v. United States*, 185 U. S. 83, 87–89;) and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

United States v. Barnes, 222 U. S. 513, at p. 520:

"Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears."

Ex parte U. S., 226 U. S. 420;
U. S. v. Levois, 17 How. 85.

Also see note, Book XX (L. ed.) Sup. Ct. Rep. "The repeal by implication of a statute is not favored by the court."

2. Commerce act gives Interstate Commerce Commission power to regulate rates; makes unreasonable rates unlawful.

Turning then to Title LVI A, Secs. 8563–8604, U. S. Compiled Statutes, Compact Edition, we find that by express proviso—

"The provisions of this Act shall apply to any corporation or any person or persons * * * *and to telegraph, telephone, and cable companies* (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act. * * * * Provided, however, That the provisions of this Act shall not apply, * * * *nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State* and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

"* * *

"(3) All charges made for any service rendered * * * *and for the transmission of messages by telegraph, telephone, or cable,* as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 8574 provides:

"Any common carrier subject to the provisions of this Act, * * * any director or officer thereof, or any receiver, trustee, *lessee*, agent, or *person acting for* * * * such corporation, who, * * * shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared

to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing * * * shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense."

3. Commerce act and resolution in pari materia; must be harmonized.

Such was the law as it stood at the time of the enactment of the joint resolution, now appearing as sec. 3115¾x, which has already been printed in full. Reading these two sections together, certainly as a matter of first impression, there is absolutely nothing inconsistent between them, nothing whatever in the latter act even to suggest an implied intention to repeal the former. But the rule, as we have seen, is that if such implication might arise, it will not be favored under the law, and will not be held effective if there is any possibility of reconciling the two statutes. They are clearly in pari materia, and must be construed, if possible, so as to harmonize.

Black on Interpretation of Laws, 331, sec. 104:

> "Statutes in pari materia are to be construed together; each legislative act is to be interpreted with reference to other acts relating to the same matter or subject."

Black, 345, sec. 105:

> "Every statute should receive such a construction as will make it harmonize with the preexisting body of law. Antagonism between the act to be

interpreted and the previous laws, whether statutory or unwritten, is to be avoided, unless it was clearly the intention of the legislature that such antagonism should arise."

4. Commerce commission retains power to fix rates.

Clearly, then, the interstate commerce act is not to be deemed repealed, and is to be read in connection with the wire control act, and we find the two acts existing side by side in the most recent revision of the federal statutes. We find that it is stated expressly that the provisions of the act apply to telegraph, telephone, and cable companies doing an interstate business; that every unjust and unreasonable charge for their services is prohibited and declared unlawful, under penalty reaching a possible maximum of five thousand dollars. The conclusion that no change was intended is confirmed by the revision of the act to regulate commerce, as published by the Interstate Commerce Commission, from which we see that express provision is made (40 Stat. L. 272, p. 10 of Act in pamphlet form):

"That during the continuance of the war in which the United States is now engaged the President is authorized, if he finds it necessary for the national defense and security, to direct that such traffic or such shipments of commodities as, in his judgment, may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, water, or otherwise."

And as we have seen in another connection, section 10 of the Federal Control Act expressly provides:

> "The President may initiate rates, fares, charges, classifications, regulations, and practices, by filing the same with the Interstate Commerce Commission."

So we see that, in the case of the railroad control act, express provision was made therein for correlating and adjusting it to the terms of the interstate commerce commission act, and that act itself was in turn modified so as to recognize the right of the President, during the continuance of the war, to designate certain priorities. The inference seems irresistible that Congress, in dealing with two related matters, and passing an act in July with express reference to the terms of a similar act passed in March, having expressly modified the law in connection with railroads, and having said nothing with reference to telephones and telegraphs, intended to leave the jurisdiction of the Interstate Commerce Commission just exactly where it found it. If it was contemplated that the Postmaster General should fix rates at all, we would hardly have a proviso declaring any but a reasonable rate unlawful, under specific penalty. The claim to the unrestrained, uncontrollable power to fix all rates at such point as he sees fit can not be reconciled with the specific statutory declaration that such charges "shall be just and reasonable; and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." This is not a mere restraint on the making of such charges by the employees of the company, but it prohibits in the broadest terms

the making of such charges at all. Can it be that the Postmaster General is given the *implied* power to do something which is expressly forbidden to be done, under penalty of $5,000 fine? The statement that we can spell out of the two statutes—one of which construed most favorably still permits of the construction that the power claimed is denied, and the other which specifically forbids its exercise—a power to do the thing not granted in the one statute and made a criminal act in the other, is carrying the doctrine of implied repeal, never favorably regarded, into an ultrahostile atmosphere. There is no escape, then, from the proposition that the control of the Interstate Commerce Commission has not in any way been altered or changed.

Is it not equally apparent that if the Postmaster General has any power to make rates, he has power to make all rates; that if it clearly appears that the law did not contemplate that he should make interstate rates (as to which it may be observed there would be far greater reason for conferring the power), then very clearly he has no power to initiate intrastate rates. Such power as he has is either all inclusive, or nonexistent; and having found that he is expressly prohibited under penalty from regulating interstate rates, it naturally follows that he has no power to regulate rates at all.

Should it be urged, notwithstanding, that he has such power to fix rates, then, there being nothing inconsistent in such provision, and the statute being, as we have seen, in pari materia, the court must hold that the provision of the Interstate Commerce Act as

to interstate telephone rates that the same shall "be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful," remains intact and unabridged. Very clearly, it was never contemplated that interstate rates should be reaonable, and that intrastate rates may be fixed arbitrarily, and hence be unreasonable.

There might have been some reason to grant the power over interstate rates; in fact, if a federal agency were to exercise such power, that would be the normal sphere for its activity. This will certainly be the first instance where such agancy had power over the domestic concerns of a state, and none outside. Such an anomaly is unthinkable.

V

THE JOINT RESOLUTION AND PRESIDENTIAL PROCLAMATION CANNOT BE CONSTRUED AS CONTENDED BY THE GOVERNMENT AND TELEPHONE COMPANIES, BECAUSE SUCH CONSTRUCTION WOULD RENDER THE RESOLUTION VOID, BY REASON OF CONFLICT WITH THE FIFTH AMENDMENT AND THE TENTH AMENDMENT OF THE FEDERAL CONSTITUTION, AND WOULD VIOLATE THE RULE AGAINST THE DELEGATION OF LEGISLATIVE POWER.

We conclude, then, that the decision of the present case involves nothing more nor less than an examination and interpretation of the joint resolution of Congress and the Presidential proclamation thereunder,

in the light of settled constitutional principles, and guided by the ordinary rule of statutory construction. We believe that the court will be convinced that the plain reading of the statute, construed in the light of all the circumstances surrounding its enactment and the purpose it was intended to serve, together with its practical construction since, will leave neither shred nor suggestion of foundation on which to ground the conclusion that Congress intended to authorize either the Postmaster General or the President to fix the rates of the telephone and telegraph.

The Supreme Court of South Dakota, in its opinion below, well said (171 N. W. 278):

> "If by that proviso Congress intended to deprive the states of the power to regulate rates for intrastate messages, then, but not until then, we would have to consider the power and authority of Congress so to do."

We do not think that this court will need to reach this question at all.

Merely as one of the considerations confirming that interpretation, we submit that to construe the act as written, as one conferring upon the Postmaster General the arbitrary power that he claims, would render it unconstitutional. Our position is, in other words, that Congress passed a perfectly valid enactment; that the Postmaster General is seeking to put upon it a construction that would render it unconstitutional. The considerations next submitted, therefore, are pursuant to the familiar principle that, if the plain meaning of the language as written permits a construction which will not run counter to constitutional prohibi-

tion, the court should adopt such construction, and thus sustain the validity of the enactment.

U. S. v. Delaware & Hudson Co., 213 U. S. 366, 407–408;
Knights Templars Indemnity Co. v. Jarman, 187 U. S. 197, 205.

The Supreme Court of South Dakota in its opinion also said (171 N. W. 277, at 278:

> "Much has been said in the brief about the war powers of Congress and of the President, but we are of the opinion that those questions are beside the issues of this case."

The theory of the defense is that Congress has under the constitution power to make all laws necessary and proper for carrying into execution the powers by that instrument vested in the Govrnment. It is argued that Congress is given the power to make war; that this connotes the power to make all laws necessary and proper for carrying into execution the power of making war. This, of course, is true, subject, however, to the one fundamental, continuing, undeviating condition and qualification recognized in *McCulloc v. Maryland*, 4 Wheat, 316, and consistently adhered to in every case construing this clause of the constitution, down to the present time. Wherever the broad rule of power to enact all necessary and proper legislation has been asserted, it has been coupled with the limitation first expressed by Justice Marshall, that the means must be such as "are not prohibited, but consist with the letter and spirit of the constitution."

This language is quoted and reaffirmed in the *Legal Tender Cases*, 12 Wall. 457, at p. 539, and the

court indicated at the foot of the same page that it would hold the legal tender acts unconstitutional if "they were prohibited."

Legal Tender Cases, 110 U. S. 421. After quoting from *McCulloch v. Maryland*, the court said, at page 441:

> "The rule of interpretation thus laid down has been constantly adhered to and acted on by this court, and was accepted as expressing the true test by all the judges who took part in the former discussions of the power of Congress to make the treasury notes of the United States a legal tender in payment of private debts."

Logan v. United States, 144 U. S. 263, quotes again and states:

> "Congress may use any means * * * consistent with the letter and spirit of the constitution."

Boske v. Comingore, 177 U. S. 459, reaffirms the test that the power is to pass laws "which are not prohibited, but consist with the letter and spirit of the Constitution."

These words are repeated in the following cases:

Flint v. Stone Tracy Co., 220 U. S. 107, at 176.

Kansas v. Colorado, 206 U. S. 46, at 88, and the court adds: "a statement which has become the settled rule of construction."

United States v. Hoke, 187 Fed. 992, at 994.

And in *Stewart v. Kahn*, 11 Wall. 493, much relied on "the act is within the canons of construction laid down by Chief Justice Marshall."

United States v. Casey, 247 Fed. 362, contains at page 366 the same significant quotation, so that

from first to last, the war power and its exericse must "consist with the letter and spirit of the constitution."

As to the meaning of war power, *Miller v. United States*, 11 Wall. 268, contains to our mind a comprehensive and exact definition of just what is meant by "war power." Construing the so-called confiscation acts of August 6, 1861 and July 17, 1862 as constitutional, the court used this language in pointing out the true distinction between what it understood as the meaning of war power and municipal or sovereign power. It said at page 304:

> "If the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, if, on the contrary, *they are an exercise of the war powers of the government*, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments. This we understand to have been conceded in the argument. The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed."

Now then, as to the character of this war power upon which no restriction is imposed, we find it stated, at page 306:

> "The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it fur-

nishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation."

And at p. 307, the court says:

"We come, then, directly to the question whether the act of 1861, and the fifth, sixth, and seventh sections of the act of 1862 were an exercise of this war power, the power of confiscation, or whether they must be regarded as mere municipal regulations for the punishment of crime."

And at p. 309:

"The purpose avowed then was legitimate, such as Congress, in the situation of the country, might constitutionally entertain, and the provisions made to carry out the purpose, viz., confiscation, were legitimate, *unless applied to others than enemies.*"

And then at p. 310:

"It has been argued, however, that the provisions of the act for confiscation are not confined in their operation to the property of enemies, but that they are applicable to the property of persons not enemies within the laws of nations. If by this is meant that they direct the seizure and confiscation of property not confiscable under the laws of war, we cannot yield to it our assent. *It may be conceded that the laws of war do not justify the seizure and confiscation of any private property except that of enemies.*"

Salamandra Ins. Co. v. New York Life Ins. Trust Co. 254 Fed. 852.

These citations seem superfluous, for the constitution itself declares "this constitution and the laws of the United States which shall be made *in pursuance thereof* * * * shall be the supreme law of the land." Neither in peace nor in war is aught the law of the land not enacted pursuant to the constitution. It is indeed a "fighting constitution" and no mere "imposing spectacle of impotency." Truly, "the power to wage war is the power to wage war successfully." But the constitution has determined what power is necessary in waging war successfully, and the power to nullify the constitution is not a necessary power in making war. Counsel and possibly some courts emphasizing the plenary character of the war power have failed to bear in mind that it is not what a particular Congress or a particular court may think is necessary in waging war successfully or what the exigencies of a particular lawsuit may require that determines the scope of the war power. The constitution asserts its scope and sets its limit because it arises out of and under the constitution. While that instrument does not contemplate national helplessness, neither does it contemplate its own destruction. It nowhere authorizes its own violation. Instances of unpermitted possibilities might be multiplied. Congress could not constitutionally create the President dictator for the period of the war. No more could it formally vote to invest him with complete legislative and judicial power, no matter how desirable some might think it that this be done. Nor could the President be authorized by Congress purely in his civil capacity and entirely apart from a declaration of martial law to supersede the existing civil

governments of the states, on the theory that the necessities of war required that they should be so displaced, because the continuance of state administration was unduly cumbrous and a burden upon the natural, harmonious, and logical development of the national resources in the interest of the national security and defense. Neither could Congress as a war measure divest all the courts of a state of civil jurisdiction and disband the public utility commissions for the period of the war, upon the theory that jurors, judges, and commissioners might better spend their time in the fields with hoe and spade, stimulating and speeding up production, and upon that exclusive ground, turn over the performance of their functions to some national instrumentality designated by Congress or to be designated by the President.

Congress could no more authorize the Postmaster General to raise revenue with which to carry on a war by arbitrarily increasing the telephone rates for that purpose, than it could authorize him to go out and seize private property of citizens generally, in order to realize revenue for war purposes. The impairment of property rights would be wholly analogous in either case.

The Constitution has determined by the fifth amendment the taking of private property by civil agencies is not necessary to the waging of war successfully.

McCray v. United States, 195 U. S. 27, at p. 61:

> "Undoubtedly both the fifth and tenth amendments qualify, in so far as they are applicable, all the provisions of the constitution."

If the federal government has the right to take over the telephone and give to the Postmaster General the arbitrary power to fix rates, and inferentially the power to exclude all users of the telephone other than governmental employes, and exclude all messages except government messages, without compensation to the private user, then on principle there would be nothing to prevent the government, for instance, in connection with Camp Grant at Rockford, to commandeer all the public utilities of the city, to the exclusion of citizens and users. An exact parallel in principle would exist had the government, by general legislation in like terms, authorized the President or the Secretary of War, when in his judgment it was necessary, to take existing water works, existing gas plants, existing light plants, and cause the same to minister solely to the comfort and the needs of the army. We would then have the anomalous situation under which, without legal proceeding of any kind, without compensation, without notice, and without hearing, the inhabitants of an entire city could be left without water, light, or fuel for cooking and yet neither Congress nor president nor military commander apart from extreme military necessity whose existence is always a fact for judicial ascertainment could commandeer so much as a ton of coal or can of kerosene from any individual citizen without due process and without just compensation.

To construe the act as permitting the Postmaster General to do what he has done and what the pleadings claim for him the right to do, would necessitate a holding that the act was unconstitutional, *first*, be-

cause it would violate the fifth amendment, which restrains the taking of property without due process of law and without just compensation; *second*, it would violate the tenth amendment, by reason of trenching or seeking to trench upon those powers which are reserved to the separate states; *third*, it would violate the fundamental rule that Congress cannot delegate legislative or arbitrary power.

1. As contrary to the fifth amendment.

That portion of the amendment involved reads:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

We need not spend time on the proposition that Congress did not have in mind making compensation to the *users* of the telephone, the telegraph, or the railroad for such deprivation of property rights as they might suffer through federal control. The provision for just compensation was clearly intended to apply to the owners of those utilities, not to anyone else. A moment's consideration of the remedial scheme embodied in the act reveals the patent absurdity of striving for a construction that it was intended to confer rights on the user of the telephone. Assuming that a reasonable rate was $1.50 per month—which prevails for residences in our community—and that the Postmaster General saw fit to increase the rate to $2.00 per month, it assuredly

was not intended that the user should enter into negotiations with the President or his representative, the Postmaster General, as to the rightfulness of such charge; and if he should succeed in convincing him that he had been overcharged in part, that the Postmaster General or President should return 75% of the overcharge to the user and relegate him to his remedy by action in the court of claims at Washington for the balance so wrongfully extorted from him.

Laying out of account the consideration that such a remedy for a minor wrong in a tribunal far removed from his domicile would be so burdensome in practical application as to amount to an absolute denial of the right; or that if available at all it would foster litigation to an extent such as no other legislation could do, unless it were a parallel act conferring the right to litigate the reasonableness of the price of every postage stamp in the court of claims, is it not apparent that the net effect of such a rigamarole would merely amount to a very laborious, cumbersome, antiquated process enabling the citizen, in a roundabout, poorly articulated sort of fashion, to arrive at a reasonable rate after interminable vexation? Clearly the amount exacted above a reasonable rate would be the measure of his deprivation and the extent of his right of recovery. That no such remedy or procedure could conceivably have been contemplated is further emphasized by the suggestion embodied in the concurring opinion of Mr. Justice Miller, in *Railroad Co. v. Minnesota, infra*, at p. 460, laying down the rule—

"that the proper, if not the only, mode of judicial relief" against rates "is by a bill in chancery asserting its unreasonable character * * *.

"That until this is done it is not competent for each individual having dealings with the carrying corporation * * * to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method,"

a rule which was subsequently adopted and confirmed in *In re Engelhard*, 231 U. S. 646. See head note 3, and see p. 651. If Congress intended to give the Postmaster General the power to fix rates, and at the same time preserve to the citizen the right to service at a reasonable rate, it would have preserved the right of review through the Interstate Commerce Commission, or some simpler and more expeditious agency.

We must assume, then, that if this act confers the rate making power, it confers an arbitrary power. The validity of the act is to be tested on the theory that the defense asserts. Conceding all that defendants claim—that the power the resolution granted is the power which the Postmaster General seeks to exercise, we are in the identical situation of this court in *Chicago, Mil. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418. It said, at p. 456:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be reexamined here as to its propriety or accuracy. The Supreme Court authoritively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed

out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable."

Substituting Postmaster General for Commission this is our case. The court continued:

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

The converse of this proposition is our position in a nutshell:

> "It deprives the" citizen of his "right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of" the Postmaster General, who, "in view of the" language of the act, "cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

It was dealing with the deprivation of the carrier or utility of property or property rights in violation of the 14th amendment. We lay claim to protection for the reciprocal and correlative property right of the user of the telephone under the 5th amendment. We say that if the enforcement of a rate unreasonably low takes the utility's property without due process of law under the 14th amendment, the extortion of a rate unreasonably high amounts to a deprivation of the citizen's right of property under the 5th amendment. We contend that one of these propositions is the inevitable corollary of the other. That if the States cannot take the carrier's right without due process, Congress cannot impair the right of the citizen in disregard of due process.

We are not primarily concerned with the reasonableness or the results of the rates now fixed. We are challenging, not the policy of the Postmaster General in the instant case, but his power to act at all.

The proposition is that once the arbitrary power contended for be conceded; that if the Postmaster

General can fix the rates as he pleases, then he can make them so high as to be prohibitive. Necessarily, what he can do indirectly, he can do directly. If there is no supervision or control as to the reasonableness of rates, there can be none as to the adequacy of service. Clearly, if service can be abridged at his mere whim or caprice, it may be denied *in toto*, and that without relation to war or the demands of war, as the Kansas court said, *In re Gardner*, 84 Kan. 264, 113 Pac. 1054, 33 L. R. A. (N. S.) 956, dealing with a deprivation of utility property contrary to the 14th amendment by arbitrary rate, "so far as the principle involved is concerned, (it) might be 1 cent per hundred miles, or nothing at all." If the principle is sound, the Postmaster General may by his arbitrary fiat, by one stroke of the pen as it were, absolutely without notice, without hearing, or opportunity to be heard, without regard to "due process" or "the law of the land," wipe out the right to use the telephone at all.

(a) The nature of the right to the use of a public utility.

What is the character of the right of the consumer, the user, the taker, in general of the public—whatever the name or designation employed—in relation to the large variety of public utilities, whether it be water companies, gas and light companies, common carriers, telephone or telegraphs? Does not each individual receive the pro tanto right to the use of the property of the utility? Hence, is it not a property right?

The citizen who arises in the morning turns on the current of electricity, making to that extent use of the property of the electric company; he turns the water faucet, making in like manner use of the mains and pipes and pumping facilities of the water company; his breakfast is prepared by heat supplied through the mains of the gas company, and pro tanto he uses the property of the gas company from its generator all the way through the distributing system that brings it to his premises. Upon tender of fare at a reasonable rate, he makes pro tanto use of the street railway system, being entitled as of absolute right to the possession and occupancy of that portion of the property necessary for his ride, and directly utilizing the facility from power plant to the seat that he occupies. Substantially all of the food that goes into his mouth, all of the garments that clothe him, are transported over the common carriers, and for that purpose temporary use is made of the transportation system, the rails, the cars, and all that go with it, of the country.

Is this use any different in quality, kind, or character, because the distributing agencies have brought it nearer to the door of the citizen—and made it more available for his use? Can it make any difference, for instance, that instead of being an undivided owner of a well, or being entitled to the use of the town pump, he receives his water from the faucet instead of at a well? That, instead of having entered into a formal contract of rental by which he has the right to go upon the premises of the gas company and set in motion the generating apparatus and carry away with him in appropriate receptacle the

commodity manufactured; or a specific, definite, individual lease of the rolling stock of the street railway or steam carrier that entitles him to propel his individual vehicle and use the real estate of the carrier, the right is raised in his behalf by implication of law entitling him upon the tender of payment for any of the facilities in question to their use? Does the fact that all of these facilities have been modernized and are not the subject of previously arranged lease or purchase, change their character in any way? Is not the right to use property, real or personal, whether dependent upon title deed, lease, or raised by implication of law, in favor of every citizen prepared to tender the price a property right? Its very essence, quality, and character is the right to use property.

The development of one right is typical of all.

> 16 *Cyc.* 620. "Every tenant for life is entitled of common right to take reasonable estovers. * * * In taking wood for fuel he is entitled to take a reasonable quantity. * * * He has no right to *sell* any of the firewood * * *."

Where wells on lands containing oil or gas are already opened, he may continue to work them. *Id.* 625.

These, without question, are property rights falling within the protection of the constitutional provision, restraining deprivation without due process of law. If the right to go into the wood and gather up the fagots, transport them homeward, and utilize them for fuel, or if the right to go upon the property and of his own labor construct facilities for trans-

porting gas to his domicile for use as fuel, are property rights, is this modernized right of estovers, under which the citizen as of right may for a reasonable price have the fuel transmitted to his kitchen at the expense of the owner—more valuable in character, more essential in modern life—a property right of less dignity, character, and standing than the ancient permission to journey to the wood lot?

Is the citizen's right to the use and enjoyment of the agencies of civilization protected only while such agencies are primitive in character?

The right to use the telephone is possibly the very clearest illustration of the quality and character of the right of property inherent in and involved in the enjoyment and use of a public utility, because, at least so far as the practice in this vicinity is concerned we have here the continuing right to the possession and use of a specific, individualized, definite, tangible piece of property that is set apart from the mass of the company's property and segregated to the use of the individual. The telephone receiver and transmitter, when once installed upon the premises of the taker, cannot be removed. The user has the absolute continuing right to retain it so long as he makes payment. As stated in Jones, *Telegraph & Telephone Companies*, sec. 258:

> "It is the duty of telephone companies to furnish equal facilities and conveniences, impartially to all, irrespective of age, race or habits, and serve all these alike on offering to comply with their reasonable regulations."

Again, in sec. 249, p 339:

> "In the case of telephone companies, each person has the right to demand and receive a telephone

and telephonic connections, facilities and services, and the best in use by such companies. Not only is it necessary that these companies should furnish the best facilities which they may have in use, but they must furnish the very best equipped and most up-to-date instruments to be used by any similar companies."

Does not the very first and fundamental declaration of the Supreme Court of the United States recognize that the right, whose existence is or may be abridged by the postmaster general, is a property right?

(b) Property rights under terms *Munn v. Ill.* Cases cited.

The very cornerstone of the doctrine of regulation is as quoted in *Munn v. Illinois*, 94 U. S. 113:

" 'When private property is affected with a public interest it ceases to be *juris privati* only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable.' "

Again, quoting from the opinion of Le Blanc, J. in *Aldnutt v. Inglis*, 12 East 527, we find the statement, at page 128:

" 'The question is, whether the warehouses be not private property clothed with a public right, and, if so, the principle of law attaches upon them.' "

Again, at page 133 of *Munn v. Illinois*, it was said:

"There is no attempt to compel these owners to grant the public an *interest* in their property."

And on the same page:

"If they did not wish to submit themselves to such interference, they should not have *clothed the public with an interest in their concerns.*"

At 134:

"Rights of property which have been created by the common law cannot be taken away without due process."

And again:

"To limit the rate of charge for services rendered in a public employment, or *for the use of property in which the public has an interest,* is only changing a regulation which existed before."

Does not this very paragraph embody all the law necessary upon the subject? It is dealing with the matter, of course, from an entirely different angle, but can it be doubted that "the use of property in which the public has an interest" by the public, is the exercise of a property right, or right of property, falling within the scope of the other sentence in the paragraph which says:

"Rights of property * * * cannot be taken away without due process."

Smyth v. Ames, 169 U. S. 466, 547:

"*What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.*"

Covington & Lexington T. R. Co. v. Sanford, 164 U. S. 578, 596–597:

" 'In prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. * * * The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * * So that the right of the public to use the denfendant's turnpike upon payment of such tolls as in view of the nature and value of the services rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable.' "

Foundations of Legal Liability (Street), p. 7:

"It is to be observed that the terms 'right' and 'duty' are substantial correlatives. They are, in fact, only different names for different aspects of that legal obligation (*vinculum juris*), by which men are held in jural relations. The term 'duty' is the name applied to the legal tie when it is viewed from the standpoint of the person who is bound to do; while the term 'right' is used when the same tie is viewed from the standpoint of the person entitled to performance."

(c) The right to receive the service of a public utility at a reasonable rate, as coming within the due process clause.

Telegraph and telephone companies must serve all impartially; must have sufficient facilities; must give service at reasonable rates. See Jones, Telegraph & Telephone Companies, secs. 248, 249, and 254.

This being the case, it follows, under the principle above stated, that the citizen has the correlative right to receive impartial service, sufficient facilities, and at reasonable rates, and, as a necessary corollary, must have the right to preservation of all machinery necessary for the determination of the reasonableness of the rate, the sufficiency of the facilities, and the impartiality of the service.

Bailey v. P. W. & B. R. R. Co., 44 Am. Dec. 602:

"A vested right is defined by Judge Duncan, in *Eakin v. Raub*, 12 Serg. & R. 359, 'as the power one has to do certain actions, or to possess certain things, according to the laws of the land.' "

Due Process of Law, McGehee, pp. 142–143:

"The rights which are thus within the protection of due process of law have been called 'vested rights,' and a vested right has been defined as a right vested in a citizen 'to do certain actions or to possess certain things according to the law of the land.' Approached from another point of view, a vested right is one which is complete and consummated, so that nothing remains to be done to fix the right of the individual to enjoy it."

Railroad Rate Regulation, Beale & Wyman, p. 103:

"We will not be content in our times with the sort of equity which the Chancellor originally evolved from his inner consciousness to deal with each case as it came before him. Still less will any people with the traditions of our race rest under proceedings of the order of the Star Chamber without being confronted with testimony against them. These decisions mean that as a people we will not be content to have our rights determined by administrative fiat; we demand reasoned judgment

based upon ascertained principles generally understood."

Story on the Constitution, 5th ed., 1950:

"It should be observed of the terms, 'life,' 'liberty,' and 'property,' that they are representative terms, and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law."

"(Liberty) The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of right."

Ekern v. McGovern, 154 Wis. 157, at pp. 254-255:

"Now in contemplation of the industry thus exercised to afford protection to the individual from injustice of any sort, can it be possible it was thought the terms 'liberty' and 'property' would not include more than freedom from unjust physical restriction and things subject to be bought and sold, or stop short of freedom for one to possess anything and to enjoy it as property, if valuable in any sense, which may lawfully administer to his reputable desires and happiness? Why stop with tangible things—things subject to transfer and measurement accurately in money? If a thing has a pecuniary value or a real value to its possessor, it seems it has a property element in the constitutional sense and freedom to enjoy it is liberty in a broad sense. * * * The framers of the constitution did not intend any narrow conception of the terms 'liberty' and 'property.' They intended, as all history shows, directly and circumstantially, to include everything valuable to the individual as regards the dominant right to the pursuit of happiness."

And as to the right of use in a public utility we add the words of

Bennett v. Twin Falls North Side Land & Water Co., 150 Pac. 336, at 339:

"When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor. *Fisher v. Bountiful City*, 21 Utah, 29, 59 Pac. 520; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81."

As we have seen, no claim can or will be made that the wire and rail acts, respectively, intended to do more than to take from the rail and wire companies, respectively, the supervision, operation, possession, and control of their properties. They were the parties in the contemplation of Congress, and they are the "persons" with whom, in practical effect, the postmaster general has arranged for just compensation. Our proposition is that when Congress took over the property and rights of the rail and wire companies, having made no provision to divest the rights of the private users, it took them just as they stood. In other words, the Government took only such property and such rights as these companies possessed, and took them subject to all of the outstanding duties and obligations of the companies, respectively. The point we make is that the companies no longer possessed the unqualified ownership of their property, and therefore, Congress and the President did not take the unqualified ownership or control of the systems in question.

As is well stated in *Spring Valley Water Co. v. City & County of San Francisco*, 165 Fed. 667, at 676, in discussing the status of a public utility:

"When a man parts with his property, it is no longer his. When he devotes it to the public use,

it ceases to be private property." Citing *Munn v. Illinois.*

Now then, what is the status of a public utility? Except for the incidents of the naked legal title, the right of legal possession, and the right to the revenues from operation, each and every public utility has in practical effect parted, to the fullest extent, with the entire beneficial use of its property. The situation is analogous in character, and identical in principle with one that would prevail, if the telephone company were free to do so, and, standing as a principal on one side, had entered into a contract with the public, organized into an association of users on the other, by the terms of which the entire use of the property was granted by the utility to the public association. The mere fact that the public is not so organized and has not entered into such formal contract, and that the obligation of the utility is raised by implication of law, does not alter or affect the situation. The residuum of interest, use, and control in the public utility is no greater in extent than it would be if such formal organization and contracts were existent. Here is a situation where the Government is taking over the property, subject to existing rights and liabilities, different in kind but subject to the same protection of law as if they were evidenced by formal lease, subject to the same protection as the interest of a mortgagee would be, neither of which could be terminated or divested, except through the due and orderly process of law and upon just compensation.

The case of *Rossmiller v. State*, 114 Wis. 169, supports this proposition. That case concerned the

right of the legislature of Wisconsin to license the cutting of ice from the meandered lakes of the state. The language employed at pages 187–188 in the discussion of the matter, with the transposition of a word or two, embodies our conception of the situation here. The title of the public utility to its property is quite analogous to the title which the state has to the bed of the lake. Substituting "Utility" for "bed of the lake," as found at page 187, and "owner" for the "state," we have:

> "The title to the" utility " is in the" owner, "but not for its own use as an entity. The mere naked legal title rests in the" owner, "but the whole beneficial use thereof * * * is vested in the people of the state as a class."

And again, at page 188:

> "Since the whole beneficial use of" *the utility* "is unchangeably vested in the people, every one within the state having the right to enjoy the same so long as he does not invade the like right of another, without any interference by claim of paramount right to the subject thereof, any law invading that invidual possession is, in effect, an invasion of the right to liberty and property without due process of law, contrary to said fourteenth amendment."

And inserting the words in italics in the concluding sentence of the paragraph, we have:

> "Any such invasion for the purpose of adding to the public revenues, exacting from a person, for the benefit of the state, compensation for the enjoyment of a right which belongs to him and which he has a right to enjoy without paying therefor" *more than the reasonable value thereof*, "violates sec-

13, art. I, of the state constitution, prohibiting the taking of private property for public use without just compensation."

Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372, recognizes inferentially at least, we think, the soundness of the proposition that the exaction of other than a reasonable rate from a consumer constitutes a taking of property without due process, because stress is there placed on the fact that the rate ordered was a reasonable rate.

To the same effect is *Aquino v. Riegelman*, 171 N. Y. S. 716, at 718:

> "I deny that the Legislature has the power, either by direct action or otherwise, to give or grant to any person rights which are the property of all the citizens of this commonwealth, and which the Legislature holds in trust for the common use and does not hold in its own right or as proprietor. I deny any power in any board or commission to sell and grant to any person, natural or artificial, such rights and properties as are held in trust for the common benefit of all the citizens of the state, and I assert that such rights are inalienable."

That the right of use of commons is within the protection of the due process clause is sanctioned by *Land Commissioner of Kaskaskia v. Kaskaskia*, 94 N. E. 970.

We therefore assert, as an incontrovertible proposition, that all that the Government did receive or could receive from the utilities was what the public utilities had—simply that, no more and no less.

A different situation might have arisen, were the carriers and the telephone of governmental creation

or construction in the first instance. Then, perhaps, on the theory that they were strictly governmental agencies, discharging a purely governmental function, it might possibly be held that the Government had the right to extend the use and privileges of its governmental apparatus on such terms, to such extent, and in such manner as it saw fit, or to withhold it altogether, although we think it does not necessarily follow, that, because operated by agents of the Government, the utility would be discharging a governmental function. Here we open an interesting line of inquiry as to the position the Government will occupy in the socialization of economic instrumentalities that now appears imminent. Possibly no more important question will need to be determined in the years immediately ahead than this very question of the position of the Government, state or national, when it enters the realm now occupied by public utilities and embarks upon the policy of government ownership. It is our conjecture that the courts must logically follow the line already marked out in the case of municipal corporations, and hold that both state and national governments when they enter upon the conduct of a business, are discharging the functions, not of a government, but of a proprietor. And that they will be held subject to the manifold liabilities to which municipalities have been subjected in their proprietary capacity, including the duty to give reasonable service at reasonable rates.

But we are not concerned with the settlement of that issue now.

For possibly the strongest and most decisive cases that can be found to sustain the contention here made is that of *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. It is especially interesting and significant that this case was concerned with the exercise of administrative or governmental functions on the part of the postmaster general, while here, we think at least, there is room for the contention that he is representing the Government purely in a proprietary or business capacity. It was there said, at p. 108:

> "That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

And then at 109, in language that could not be more clearly or decisively applicable to the present situation if the court had written it with the pleadings in these very cases before it, it is said:

> "The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power

in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

This case will be cited in other connections. For the present, the point we desire to emphasize is that, while the fifth amendment is not mentioned in express terms, it is specifically stated that the postmaster general violates the property rights of the persons whose letters are withheld, the prevention of which violation, of course, is referable to the fifth amendment.

Is it not perfectly clear that if the arbitrary and unauthorized withholding of written communication constitutes a violation of property rights, the arbitrary and unauthorized withholding of oral communication constitutes a like violation of property rights? It is not interference with property in the possession of the particular piece of paper, or in the particular tracings of ink that constitutes the essence of the violation; it is the prevention of the receipt of the communication contained in the letter. It is true that the letters in question contained checks, drafts, moneyorders, and money itself, but in the paragraph quoted, there is nothing to indicate but what the same result would have followed from the mere withholding of the mail, even though there had been no money in the letters. It would be equally true in the case of many an organization, if, to para-

phrase the opinion, it were to be entirely cut off from all telephone facilities, its business would be greatly injured, if not wholly destroyed.

Even though the element of property involved were the money contained in the letters, at least as to the telegraph feature of the wire control bill, the same thing would obtain, because the transmission of money by telegraph has become a commonplace and it is easily conceivable that large sums of money may be transferred from the credit of one individual to that of another through the medium of the telephone. So that, had that been the test of the case, this element can readily be imported into the exercise of the power in question by the postmaster general, even as to the use of the telephone.

Fairfield Floral Co. v. Bradbury, 87 Fed. 415, at p. 417:

> "If I were free to follow my own judgment, I should say that congress, neither directly, nor through the postmaster general or any one else, has any constitutional authority to impose the penalty of forfeiture of the use of the mails of the United States, at least without a trial."

We close the discussion with this prophetic judicial forecast of what the law must be, made by a Federal court.

Hoover v. McChesney, 81 Fed. 472, at 480:

> "If the United States government should hereafter become the owner of all the transportation lines in the United States, and thus the common carrier of the nation, and by law exclude all others from becoming common carriers, it would seem to follow inevitably that the citizens of the United

States would have a common right to travel and ship freight over the lines thus owned and operated by the United States, and that all of its citizens, subject to such general laws and regulations as to rates and the operation of the lines as might be enacted and established, would have this common right, and that such a right would be readily recognized as a property right in the citizen, and one of which a particular citizen could not be deprived except by due process of law. We think the right to the use of the mails, though in degree much less valuable than the use of the transportation lines, would be equally a property right, and one which could not be taken away except by due process of law."

And again, at 480:

"It is not to be overlooked that the establishment of the postal service and its operation is the exercise of a governmental function."

After quoting the definition of Webster in the *Dartmouth College Case*, 4 Wheat. 518, the court continues, at p. 481:

"* * * In the case of *Bank of Columbia v. Okely*, 4 Wheat. 235, as more comprehensive and more accurate. Justice Johnson says:

" 'As to the words from Magna Charta incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.'

"If we are correct in concluding that the use of the postal service of the United States by a citizen thereof is a right in the nature of a property right,

then it must follow that the order of the 17th of February, 1896, of the postmaster general, which finds complainant guilty of a violation of the postal laws, and prohibits to him the use of the postal service of the United States as far as the receiving of mail is concerned, during his pleasure, is not due process of law within the constitutional meaning."

And in conclusion, at 485, uses language directly applicable and controlling in these cases:

"These cases, we think, are a distinct ruling that a bill of injunction is the proper remedy, if in law the authority exercised by the postmaster general is beyond his constitutional authority. Any other view than herein expressed would leave a citizen without remedy, and this perfect and magnificent postal system of the United States subject as to its use to the arbitrary will of the postmaster general. If he can decide finally, without court or jury or other legal trial, whether a business which is being carried on is within the statutory prohibition, and also that a certain citizen or citizens are engaged in that business, and, having thus decided, can prohibit absolutely by general order the use of the mails and postal service of the United States, not only in that business, but by such citizen or citizens, then, indeed, as to this use, are the citizens of the United States outside of the guaranties of the constitution."

2. As contrary to the tenth amendment.

(a) Police power reserved to the states.

If we may take it then as established that to uphold the constitutionality of the resolution requires a construction that the Government remains under

the continuing duty to render the public adequate service at reasonable rates, then we say that Congress has not the power, under the Constitution, to fix intrastate rates and therefore could not and did not delegate that power either to the President or to the postmaster general.

Art. X of the amendments to the federal constitution reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

That this amounts to the fullest reservation of the police power to the state has been frequently decided.

Black's *Constitutional Law*, Sec. 154:

> "The statement is frequently made that congress is not invested with the police power. It is true that congress has no general power to make police regulations for the people of the United States, nor has it authority to interfere, in matters not committed to its exclusive jurisdiction, with the internal affairs of the states, under the pretense of police regulations."

Civil Rights Cases, 109 U. S. 3, considers the power of Congress to pass a law conferring on all persons "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement," At p. 10:

> "Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amend-

ments." (Referring to the 13th, 14th, and 15th amendments.)

After discussing the 14th amendment, the court concludes:

"This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation."

Western Union Tel. Co. v. Pendleton, 95 Ind. 12:

"The police power is the right to regulate the enjoyment of property, to maintain public order, to secure the rights of citizenship, and to prevent injury to private rights. This power can not be exercised within state limits by the Congress of the nation." Citing cases.

"The power of enacting laws upon this subject resides solely and exclusively in the states and extends to all matters of personal and property rights within the states."

Upon appeal to the supreme court of the United States, the decision was reversed, on the ground that the Indiana law under consideration was in conflict with the power of Congress to regulate commerce, but the court we think, in express terms, recognized the principle we urge.

Western Union Tel. Co. v. Pendleton, 122 U. S. 347, at p. 359, it is said:

"The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation, that the state does not thereby encroach upon the free exercise of *the power vested in Congress by the Constitution*. Within that limitation it may, undoubtedly, make all necessary provisions with

respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require."

City of New York v. Miln, 11 P. 102, 12 U. S. 357, at p. 139:

"We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."

Keller v. U. S., 213 U. S. 138, at pp. 144–145:

"In *Patterson v. Kentucky*, 97 U. S. 501, 503, is this declaration:

" 'In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government.' Cooley, Const. Lim. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the States must

observe in its exercise, the existence of such a power in the States has been uniformly recognized in this court. *Gibbons v. Ogden*, 9 Wheat. 1; *License Cases*, 5 How. 504; *Gilman v. Philadelphia*, 3 Wall. 713; *Henderson v. Mayor of the City of New York*, 92 U. S. 259; *Railroad Company v. Husen*, 95 U. S. 465; *Beer Company v. Massachusetts*, 97 U. S. 25. It is embraced in what Mr. Chief Justice Marshall in *Gibbons v. Ogden*, calls that 'immense mass of legislation,' which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control.'

"And in *Barbier v. Connolly*, 113 U. S. 27, 31, it is said:

" 'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.' "

In re Pacific Railway Commission, 32 Fed. 241, at 245:

"Any legislation of congress beyond the limits of the powers delegated is an invasion of the rights reserved to the states or to the people, and is necessarily void."

Cook v. Marshall Co., 196 U. S. 261.
Plumley v. Massachusetts, 155 U. S. 461.
House v. Mayes, 219 U. S. 270:

"Such a power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; that among the powers of the State, not surrendered—which power therefore remains with

the State—is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good."

Covington, etc. Bridge Co. v. Kentucky, 154 U. S. 204, pp. 209–210.

Hammer v. Dagenhart, 247 U. S. 251, at 274:

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.

"Police regulations relating to the internal trade and affairs of the States have been uniformly recognized as within such control. 'This,' said this court in *United States v. Dewitt*, 9 Wall. 41, 45, 'has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.' See *Keller v. United States*, 213 U. S. 138, 144, 145, 146. Cooley's Constitutional Limitations, 7th ed., p. 11."

Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6:

"The police power of a state is as broad and plenary as its taxing power; and property within the state is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

(b) Especially is the police power preserved as to regulation of intrastate rates.

C. B. & Q. Ry. Co. v. Drainage Commissioners, 200 U. S. 561, 592, 26 Sup. Ct. 341, 50 L. Ed. 596:

"We hold that the police power of a state embraces regulations designed to promote the *public convenience and the general prosperity*, as well as

the regulations designed to promote the public health, the public morals, or the public safety."

Lake Shore & Michigan Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 703:

"Now it is evident that these cases (referring to the cases cited in the opinion) had no reference to the health, morals, or safety of the people of the state, but only to the public convenience. They recognize the fundamental principle that, outside of the field directly occupied by the general government under the powers granted to it by the Constitution, all questions arising within a state, *that relate to its internal order or that involve the public convenience or the general good*, are primarily for the determination of the state, and that its legislative enactments relating to those subjects, and which are not inconsistent with the state Constitution, are to be respected and enforced in the courts of the Union, if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the national Constitution."

Arkansas Rate Cases, 187 Fed. 290. Subdiv. 6 at p. 297 contains a very exhaustive discussion of this proposition. The court said:

"The right of every sovereign state to regulate public service corporations and the rates to be charged by them, subject to the provisions of the fourteenth amendment prohibiting deprivation of one's property without due process of law and other provisions of the national Constitution, rests upon the police powers, which 'are nothing more or less than the powers of government inherent in every sovereignty.' License Cases, 5 How. 583, 12 L. Ed. 256; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 393, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 521, 18 Sup. Ct. 418, 42 L. Ed. 819."

The court then continues with a most exhaustive citation of authorities, for which reference is made to that opinion.

(c) Subject only to the one limitation that it must not impair the efficient exercise of federal function, the police power of the state has been repeatedly asserted and fully sustained in the regulation of federal agencies.

Two of the earliest and at the same time leading cases on the subject are found in one volume of the United States Reports.

National Bank v. Commonwealth, 9 Wall. 353, at 361:

"It certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation."

And at 362:

"The agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. * * * It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

Thompson v. Pacific Railroad, 9 Wall. 579, where the court discussed the rule as to a railroad performing federal services, and stated the rule

that Congress "may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them."

Here we have the rule stated as to taxation, in the one case of a national bank, in the other of a railroad *Railroad Company v. Peniston*, 18 Wall. 5, states the rule as to taxation by the states, which is the same rule that exists as to their police power, and while the statement in the case relates only to one power, it characterizes the other just as aptly. At p. 29:

> "The taxing power of a State is one of its attributes of sovereignty; * * * it exists independently of the Constitution of the United States, and underived from that instrument * * *. No one ever doubted that before the adoption of the Constitution of the United States each of the States possessed unlimited power to tax."

And at p. 30, it quotes the language of *Lane County v. Oregon*, 7 Wall. 77:

> " 'There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by National legislation.' "

The charter of the railroad was designed, the court said, "to secure an agency competent and under obligation to perform certain offices for the general government," the same being "for postal and military purposes." The court concluded, at p. 37:

> "It is impossible to maintain that this is an interference with the exercise of any power belonging to the General government, and if it is not, it is prohibited by no constitutional implication."

Waite v. Dowley, 94 U. S. 527, at 533:

> "The national banks organized under the acts of Congress are subject to State legislation, except where such legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of their creation."

In the case of *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 416, the court sustained the regulation of rates of a corporation organized under a statute of the United States and receiving therefrom the corporate power to charge and collect tolls and rates, it being said:

> "There is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress."

McClellan v. Chipman, 164 U. S. 347, citing *Bank v. Commonwealth, supra*, with approval states the policy as to federal agencies to be that of—

> "preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States."

Hibernia Savings & Loan Society v. San Francisco, 200 U. S. 310, quotes with approval the rule, as stated in *National Bank v. Commonwealth* and *Railroad Company v. Peniston, supra.*

Smyth v. Ames, 169 U. S. 466, involved the regulation of the Union Pacific Railroad, there being an express reservation of power to Congress for that purpose, and it was held that in the absence of action by Congress, following th case of *Reagan v. Mercantile Trust Company*, *Thomson v. Pacific Railroad*, and *Railroad Co. v. Peniston*, the state still retained the power of regulating the rates.

New England Telegraph Co. v. Town of Essex, 206 Fed. 926, is one of a long series of cases where telegraph companies that have accepted the provisions of Title LXV of the Revised Statutes, bringing them under the jurisdiction of the postmaster general, have sought to escape state taxation or regulation, on the ground that their power was to be exercised independent of state control. The court said, at pp. 931–932:

> "The company is subject to the taxing power of the state, and to the imposition by the state of police or other regulations not inconsistent with those established by Congress. The taxes imposed, however, must not be of a character, nor the methods of collecting them such as to effect the exclusion of the company from the state or the stoppage of its business. The regulations must not be arbitrary, unreasonable, nor such as have the effect of excluding the company from the state or forbidding it to carry on its business therein."

Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530, quotes with approval the language of *National Bank v. Commonwealth*, 9 Wall. 353, and it is said at p. 551:

> "This court said that the principle of exemption of Federal agencies from state taxation has a limi-

tation growing out of the necessity upon which the principle is founded. 'That limitation is, that the agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States * * *.'"

To the same effect is *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688.

Central Pac. R. R. Co. v. California, 162 U. S. 91, arose out of suit brought by the state of California for the collection of a tax imposed by it upon the franchise of the Central Pacific Railroad Company. This company enjoyed a federal franchise (p. 123). Previous cases holding that the federal franchise could not be taxed followed (p. 125), it being said:

"It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a State may tax the property of the agents, subject to the limitations pointed out in *Railroad Co. v. Peniston. Van Brocklin v. Tennessee*, 117 U. S. 151, 177."

And at p. 126:

"So far as the ability of the company to discharge its duties and obligations to the general government is concerned it is difficult to see that taxation of the state franchise would tend to impair that ability any more than taxation of the

roadway, roadbed, rails and rolling stock. If the necessary effect of a tax on such tangible property is not to unconstitutionally hinder the efficient exercise of the power to serve the government, neither can it be so in respect of the state franchise. Indeed the taxation by the State of the franchise granted by it does not, and could not, prevent plaintiff in error from acting under its Federal franchise."

Williams v. Talladega, 226 U. S. 404. While holding in that case on the authority of *Telegraph Company v. Texas*, 105 U. S. 460, that government messages could not be taxed because such taxation would be "a tax by the State on the means employed by the Government of the United States to execute its constitutional powers, and therefore void," it nevertheless concludes, after reviewing cases:

"These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the Company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State. Nor is there anything running counter to the former cases in the case of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1."

The power of a state, then, whether of regulation or taxation of a federal agency, before it may be said to affect the federal function in such a way as to

permit Congress to legislate away its existence, must be one the exercise of which retards the execution of the federal purpose or directly interferes with it. And unless such is the natural, necessary, and inevitable result of regulation by the state, Congress not only should properly leave it to the state as a matter of policy, but it may not constitutionally interfere with or supersede such regulations. This rule, we admit, has been generally stated in its negative, rather than its positive aspects. The approach has been from the standpoint of the prohibited limits, rather than of the plenary character within those limits. The emphasis has been constantly directed to the ascertainment of where the power of the state stops, not how far it may proceed. But obviously, the state and federal power in this respect are in a state of exact and proper balance, and to say that a state may not go beyond the boundary where its action burdens or injuriously affects a federal agency in the discharge of federal function, states only half the rule, because up to that limit the state must of necessity retain the constant continuing constitutional power to legislate, free and untrammeled by any suggestion or possibility of Congressional interference. This is but another way of saying that all hat Congress is or can be interested in is to secure he complete and perfect discharge of the designated ederal purpose or function; and that, having assured tself by appropriate legislation that the same will be arried out free from interference or control by the tate, it necessarily follows that Congress can have no urther power or interest in the matter. That this

line of demarcation has not always been clearly kept in mind is apparent. Too frequently we find the limitation, the prohibition on the power of the states has been stressed, and its plenipotentiary character inside the limitation or prohibition has been slurred. But the line of division between state and federal power serves not merely to set for the state "the very sea mark of its utmost sail," but fixes the limit to the course and cruise of federal power as well.

(d) The question of the dividing line for the court, not Congress.

South Carolina v. U. S., 199 U. S. 437, at p. 448:

> "There are certain matters over which the National Government has absolute control and no action of the state can interfere therewith, and there are others in which the state is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, pre-eminently of this—a duty oftentimes of great delicacy and difficulty."

Obviously, Congress cannot be the sole judge of how much or how far legislation is necessary to fully insure the discharge of the federal purpose, because the moment that is assumed to be the rule, then the power of Congress becomes unlimited, and under the guise of furthering federal purpose, it can do whatever it may see fit, with the result of completely overturning the control expressly reserved to the states in matters of police or in the regulation of their internal

affairs. Where and when, then, this mutual bound and barrier exists or arises in any given case is a judicial, not a legislative question, to be settled by the court, not by Congress, not from the standpoint of public policy, but from the standpoint of constitutional power. Otherwise, we have the anomalous result that a limited delegated power has taken on unlimited character.

We think that the early case of *Railroad Company v. Peniston*, 18 Wall. 5, clearly lays down this rule. It points out, at p. 30:

> "It is often a difficult question whether a tax imposed by a State *does in fact* invade the domain of the General government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted."

And at p. 36, it lays down the test of whether in any given case the federal agency is exempt from state taxation or control as dependent—

> "upon the question whether the tax does *in truth* deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power."

That the courts have at all times been clear and consistent in their adherence to this fundamental principle as announced in this early decision, candor would permit no one to assert. Neither will reason concede that logic permits the existence of any other rule. And while language can be found in many cases, stating in effect that the existence or exercise of power by the state at all is dependent "on the permissive legislation of Congress," we think that all

such statements must be read in the light of the clear implication or modification that all that is meant is that the state may intrude within the domain of power delegated to or conferred upon Congress by the constitution only with the permission of Congress, and apparently it was assumed in the given case that the state was seeking to intrude within the sphere clearly set aside for Congressional activity.

While this confusion has crept into some of the decisions, so recently as the case of *Hibernia Savings & Loan Society v. San Francisco*, 200 U. S. 310, the court, reaffirming the proposition, at p. 313, "the efficiency of the government service cannot be impaired by a taxation of the agencies which it employs for such service," returns to and reaffirms the test, by quoting the language from the *Peniston* case, that is, "whether the tax does *in truth* deprive them of power to serve the government."

We think it cannot be disputed that the analogy is complete and entire between the relative exercise of power of state and federal government, in the regulation of federal agency in the discharge of federal function, and the like exercise or restraint of exercise of power in the matter of interstate commerce, exclusive jurisdiction over which has been entrusted to Congress. Such exclusive jurisdiction and control in Congress over interstate commerce has been as jealously guarded and protected by the courts as the right to exercise federal function possibly could be. We think in a very real and proper sense, although not expressly so denominated, interstate commerce

is a federal function and its prosecution serves a federal purpose. We believe, therefore, that all cases where the court has asserted its unquestioned right to determine what part of the field should be occupied by state and Congress, respectively, in the regulation of the vexatious and difficult subject of commerce, are forceful precedent to sustain the like exercise of the power of the court to mark the boundary, beyond which neither federal government nor state may go—the one in burdening or seeking to burden the federal function, the other in intruding upon the domain of state activity, under the guise of furthering the free and unhampered exercise of federal function.

The following recent illustrations suffice to establish that it is the province of the court and not of Congress to determine when Congress has encroached upon the field of the state in any dealing with commerce, and consequently in any dealing with federal functions as discharged by government agency. In the *Employers Liability Cases*, 207 U. S. 463, the court, at 496, said:

> "Thus the want of power in a State to interfere with an interstate commerce train, if thereby a direct burden is imposed upon interstate commerce, is settled beyond question."

This language, with the substitution of a word or two, would state the rule as to the want of power of a state in dealing with governmental agency. The court then addressed itself, at 498, to the act in question, and held it unconstitutional, because it sought to impose a liability arising out of subjects "wholly outside of the power of Congress to regulate

commerce," and among its illustrations said, "Take a telegraph company engaged in the transmission of interstate and local messages," and concludes, at 499,

> "As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced."

We are quite content to rest the argument upon this proposition upon the statement of the court, in the case of *Hammer v. Dagenhart*, 247 U. S. 251, language equally applicable to the regulation of commerce or governmental agency formally devoted to the exercise of federal purposes, at 276:

> "We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution."

(c) Federal function in question defined efficient "transmission of government communications."

Nor are we left in doubt in the present case as to what that federal function is. We find it stated, although we presume it needed no statement, in the last few lines of the joint resolution. It is the most

efficient possible "transmission of government communications," and Congress has attempted by legislative construction to declare that the issue of stocks and bonds would or might impair or affect the discharge of that function. This, we submit, is the sole purpose of this exception. It could have no other one. It sets out in the plainest possible way what Congress intended. As we shall see, that was the purpose in the act as originally drawn. Its title indicated it, and that title remained until the full and final text of the joint resolution had assumed its present form. That was the initial purpose of the act, and that, by legislative definition, is the present purpose of the act, to wit:

> "To insure the continuous operation of electric communicating systems, to guard the secrecy of war despatches, and prevent communications between public enemies." See H. J. Resolution 309; S. J. Resolution 163. Cong. Record, July 5, 1918, p. 9465.

(f) Regulation of rates by the individual states does not in truth or in fact hinder or retard the discharge of the stated federal purpose.

It being settled, then, that rates must be reasonable and that it is the province of the court to determine whether the determination of that reasonableness by state agencies will imp air the efficiency of the federal function aimed at in the present case, to wit, "to insure the continuous operation of electric communicating systems, to guard the secrecy of war dispatches, and prevent communication between public enemies," we come then to the question: whether state regula-

tion of intrastate rates of telephone companies, in the language of the *Peniston* case, does "in truth, deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power."

A mere statement of the proposition would seem to be its own conclusive answer. Regulation being assumed, reasonableness of rates being necessary to be determined, how can it be said that their determination by the tribunal most conversant with conditions and factors involved in reasonable rates, best able to command all information lacking and necessary to decision, will impair efficiency of federal function? The federal courts have expressly recognized that such rates are a local matter. It was said in *Cumberland Tel. & Tel. Co. v. City of Memphis*, 183 Fed. 875, at 877:

> "The conditions in no two cities may be alike, and it seems reasonable to say that questions as to telephone rates may in large measure be local questions to be determined upon factors, among which the most important may be (1) the cost of the plant; (2) the cost of operation and maintenance; (3) the amount of taxes and other dues exacted by the local government; and (4) the rapidity of deterioration due to climatic or other causes. If these be among the controlling factors, no one of them seems to have been considered in any detail by the city."

This being so, does it not follow, not merely that there will be no hindrance to efficient discharge of federal function, but that efficiency will be increased, not diminished, by leaving the determination of rates to be made where the witnesses reside. Em-

ployes and individuals conversant with local conditions could then testify with a minimum of interruption to the service they were expected to render in insuring "continuous operation of electric communicating systems." That very consideration was found sufficient to sustain the order of the director general of the railroads, providing—

> "all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

In *Wainwright v. Pennsylvania R. Co.*, 253 Fed. 459, the court, at 465, makes the pertinent inquiry:

> "How are munitions, clothing, food, coal, and other supplies necessary to carry on the war, to be transported expeditiously, if the employes, without whom trains cannot be operated, are to be compelled to leave their employment to attend as witnesses at places hundreds of miles away from where their duties require them to be?"

3. The President cannot arrogate, Congress cannot delegate legislative or arbitrary power.

(a) As to legislative power per se.

As a further aid to the court in construing the joint resolution of Congress, we submit that to adopt the construction which the attorneys for the defense and for the Government contend should be given to this joint resolution would render it unconstitutional, for the additional reason that it would constitute a clear delegation of legislative power.

First, we think that such construction would confer upon the President the power to determine whether there should be regulation of rates, either by himself or by someone whom he might designate. In other words, it would permit him to determine whether there should in fact be any law at all. Secondly, the power of rate making as contended for would itself involve the performance of legislative function.

1. Congress could not delegate to President power to decide between three separate capacities in which he might deal with the telephone and telegraph.

As to the first of these propositions, we ask how could there be a clearer delegation of legislative power conceived ot than such as is involved in defendants' construction of this resolution? Is there not a delegation of the power to determine, not merely that a certain law of well defined character shall come into existence upon the happening of a certain contingency, or the determination of a certain fact by the executive, but what the law so to come into existence shall be?

A well recognized enunciation of the rule against the delegation of legislative power is contained in the leading case of *C. W., etc. R. R. v. Commissioner of Clinton County*, 1 Ohio St., 88, as follows:

> "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance

of the law. The first cannot be done; to the latter no valid objection can be made."

This language has been incorporated into and made a part of its opinion by the Wisconsin court in the early and leading case, *In re Oliver*, 17 Wis. 681, at 685, and has likewise been incorporated into and made a part of the most notable decision discussing the delegation of legislative power by the supreme court of the United States, in *Field v. Clark*, 143 U. S. 649, the language being quoted at 693.

It is true, of course, as stated by the Wisconsin court in the *Oliver* case—

> "There is perhaps no class of questions ever presented for judicial consideration, which involve more real difficulty, or leave greater room for the mind to remain in doubt, than those which involve the boundaries between that legislative power which cannot be delegated, and those discretionary powers which the legislature may entrust to other departments or persons in the execution of the laws."

But it has been said (dissenting opinion of Justice Dodge in the case of *M. St. P. & S. S. M. R. Co. v Railroad Commission*, 136 Wis. 146):

> "The very essential and distinguishing characteristic of legislative action is choosing between different policies on grounds of expediency, and, when choice is made, in declaring for the future a rule of conduct embodying that policy."

The character of power and authority which may save an act from being unconstitutional is, in the language of the Wisconsin court in *State ex rel. Buell v. Frear*,

146 Wis. 291, where the delegated agency is invested "with no arbitrary and uncontrolled discretion," but is directed "to ascertain the facts and to apply the rules of law thereto under the prescribed terms and conditions." Such action is not legislative in character, but is the performance of an executive and ministerial duty within the regulations provided in the a t.

Illustrations of the rule follow:

State v. Duval County, 79 So. 692, at 696:

"(9) The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose."

State v. Rogers, 73 N. E. 461, 463:

"The Constitution of Ohio (article 2, sec. 20) provides that "the General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of all officers.' The constitution itself having thus in express terms confided to the legislative department the power to fix the compensation of all officers, that branch of the government is without right to delegate such power to a co-ordinate branch."

Sabre v. Rutland R. Co., 85 Atl. 693, 701:

"The General Assembly cannot delegate functions which are purely and strictly legislative, but,

having by general law and by charters made legislative provisions of unquestionable constitutionality applicable to railroad corporations, it may confer upon the commission the power upon investigation to apply the general provisions of law to particular circumstances and situations, and may leave much of detail to the discretion of the commission. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Union Bridge Co. v. United States*, 204 U. S. 384, 27 Sup. Ct. 367, 51 L. Ed. 523; *United States v. Grimaud*, 220 U. S. 506, 516, 31 Sup. Ct. 480, 55 L. Ed. 563."

State v. Budge, 105 N. W. 724 (N. D.), was a case involving the delegation of legislative power to a capitol commission. The court said at 727:

"Section 17 of the enabling act prescribes that the lands donated by the United States to the state for public buildings shall be disposed of as provided by the enabling act, and shall be disposed of in the manner provided by the Legislature. The Legislature does not comply with these provisions of the enabling act, when it leaves it, without restriction or direction, to the capitol commission board to dispose of these funds in such manner as it deems wise, subject to one limitation only, that a capitol building shall be remodeled and reconstructed and a governor's residence erected."

The decision of the court in this case was followed and approved in *State ex rel. Miller v. Taylor*, 145 N. W. 425.

Stating the rule most favorably to the defendants:

"Congress cannot be permitted to abandon to others its proper legislative functions; but in time of war when legislation must be adapted to many situations of the utmost complexity, which must be dealt with effectively and promptly, there is

special need for flexibility and for every resource of practicality; and, of course, whether the limits of permissible delegation are in any case overstepped always remains a judicial question." *Address of Charles E. Hughes, before Bar Association*, Vol. 52, *Reports of American Bar Association*, p. 241.

In the present case, having regard to the joint resolution alone, if it were to be construed as the postmaster general has sought to construe it and as the defense contend it should and must be construed, it would grant just the character of power which the opinion of the Wisconsin court in the civil service case quoted above says "may not and cannot be constitutionally granted," and therefore it must be held unconstitutional. No question is raised now as to the power of Congress to provide that the operation of the telegraph and telephone should be undertaken upon the ascertainment and determination as a fact by the President that the public necessity required that they should be taken over; but beyond delegating to the President the general power to take over the telephone and telegraph and operate the same under prescribed conditions, which we think has clearly been done, Congress could not go.

But here under their construction we have the much more fundamental determination of public policy to be made by the President between two alternative and, to some extent, inconsistent methods of exercising power. In other words, if their contention is to prevail, the President has the clear discretion to choose between operation under existing conditions, on one hand, or to regulate by fixing

rates, on the other. Or he might have the third alternative—which the postmaster general has practically sought to exercise—of a mixed power to take possession, control, and operate, coupled with the power to regulate the rates. Here are three distinct alternatives which in varying degrees might be exercised by the President, none of which is specifically denominated in the act of Congress at all, because in our judgment the act clearly provides for operation through the medium of existing organizations. If their construction is to obtain, the possibilities of Presidential determination are unlimited. By executive fiat, the telephone systems might be made a part of the military establishment; they might be constituted a part of the postal system they might be left to existing management, or the President and postmaster general might do what they have done. This construction, to our mind, involves no mere matter of determining when a law shall go into effect, but involves the proposition of unlimited power to legislate upon a subject which Congress has seen fit to confide in its entirety to executive discretion.

It was clearly competent for Congress to invest the President with power to determine whether such operation should be undertaken in the interests of the national defense, but had the act in plain terms stated what the defendants contend, had it specifically provided that the President at his option might constitute himself (1) a rate fixing agency with functions entirely analogous in character and kind to those of the Interstate Commerce Commission and

the existing rate commissions of the various states; (2) or constitute himself the general manager of all existing telephone systems, subject to all existing regulations; or (3) to assume the power of manager and the power to fix rates as well, we think that there would be unquestionably such attempt at the delegation of legislative power—such abdication of the function with which the constitution has invested Congress and no other, as to render the joint resolution clearly invalid. As we have said, we think the resolution does nothing of the kind, and that the court will not even need to consider the question of attempted delegation of legislative power, because we think no such attempt was made. The act did not attempt to confer upon the President the discretion and the authority which the defense seeks to claim for him.

2. The power to fix rates could not be delegated.

This aspect of the matter as just considered is quite separate and distinct from the like delegation of power involved in the matter of conferring unlimited discretion in the fixing of rates.

If we were to construe the act as the defense would have us construe it, then it is entirely conceivable that in the exercise of Presidential discretion, having the power to regulate—which we assume arises, if at all, by reason of the term "supervision"—then the President might, if he saw fit, regulate the rates of the telephone companies and stop there—he being the absolute judge of the extent and manner in which his power should be exercised, for we are advised

that he has absolute, unlimited, uncontrolled discretion. This alone, we think, under the language of the Wisconsin court in 136 Wis., would be enough to condemn it, *Minn. St. P. & S. S. M. R. Co. v. Railroad Commission*, 136 Wis. 146 at p. 164.

> "If it were conceded that the commission had power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this was not a delegation of pure legislative power to the commission."

The President would have the alternative of putting into effect not merely one of several rates which were reasonable, but he would have the right, as the defense claims, to put into effect any rate that he saw fit, whether reasonable or otherwise. That, the courts have challenged as something that could not be done.

It is too clearly established to need citation, that the fixing of rates is a legislative function. We find that the sole sustaining theory upon which the power of rate fixing by commissions or other repositories of delegated power rests is that the function of the commission is limited to the ascertainment of a fact, to-wit, a reasonable rate, and that upon the ascertainment of such fact, the law automatically adopts and takes unto itself the rate so ascertained and determined as reasonable, as not merely the condition rendering the law operative, but coincidently as the exact term of the law itself.

The whole theory of the matter has been most lucidly phrased by the Wisconsin court in the case of the *Soo Railroad v. Railroad Commission*, 136

Wis. 146, at page 163, prefacing the discussion with a reaffirmance of the language of Justice Redfield, in *State v. Parker*, 26 Vt. 357, that the contingency or fact must be "so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one." The court continues:

> "The legislature may delegate any power not legislative which it may itself rightfully exercise. *Wayman v. Southard*, 10 Wheat. 1. *This power to ascertain facts is such a power as may be delegated.*
>
> "The cases heretofore cited with reference to the constitutionality of laws creating a railroad board or commission and authorizing the latter to ascertain and fix reasonable rates, which rates, thus ascertained, would be thenceforth in force, rest on these rules of law. * * * This law (ch. 362, Laws of 1905) establishes, and thenceforth assumes, the existence of rates, charges, classifications, and services discoverable by investigation, but undisclosed, which are exactly reasonable and just. It commits to the Railroad Commission the duty to ascertain and disclose that particular rate, charge, classification, or service. The law intends that there is only one rate, charge, or service that is reasonable and just * * * But the theory and the mandate of the law is that this point always exists under any combination of conditions and is always discoverable although not always discovered. Until it is discovered and made known the former rates and service prevail. The order of the Commission is *prima facie* evidence that the rate, charge, or service found and fixed by it is the particular rate, charge, or service declared by the legislature in general terms to be lawful and to be in force. If it were conceded that the Commission had power or discretion to fix one of several rates, either of which would be just and reasonable, *it would be hard to say that this was not a delegation of pure legislative power to the Commission.* But

the theory of this law is to delegate to the Commission the power to ascertain facts and to make mere administrative regulations."

(b) A delegation such as claimed would also be void as an attempt to delegate arbitrary power.

Frequently we find assertion of the proposition that arbitrary power cannot be delegated. Sometimes this is treated as synonymous with legislative power for the reason we presume that within constitutional limitations the legislature is not accountable for motive or reason and in that sense its action is arbitrary.

The rule so stated in

Sheldon v. Hoyne, 103 N. E. 1021, 1022:

"Unlimited power, to be exercised in accordance with the whim or caprice of public officials, is inconsistent with our system of government. *Moore v. Mayor of Danville*, 232 Ill. 307, 83 N. E. 845. Any law that compels a man to hold 'any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. Such arbitrary power is, under the settled rules of law in this and other jurisdictions, a delegation by the Legislature of its legislative functions to the officials in question and is therefore invalid. *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; *City of Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *Commonwealth v. Maletsky*, 203 Mass. 241, 89 N. E. 245, 24 L. R. A. (N. S.) 1168; *Little Chute v. Van Camp*, 136 Wis. 526, 117 N. W. 1012, 128 Am. St. Rep. 1100; *State v. Tenant*, 110

N. C. 609, 14 S. E. 387, 15 L. R. A. 423, 28 Am. St. Rep. 745."

"Arbitrary power and uncontrolled authority were not recognized" in the principles of the common law. Cooley Const. Lim. p. 50.

The authorities cited at p. 27 of this brief govern. *Little Chute v. Van Camp*, 136 Wis. 526, seems to embody a decision covering all the principles applicable here.

"The defendant was convicted of violating an ordinance of the plaintiff village reading as follows:

" 'All saloons in said village shall be closed at 11 o'clock p. m. each day and remain closed until 5 o'clock on the following morning, unless by special permission of the president.'

"We regard the ordinance as void for two reasons: First, because it attempts to confer arbitrary power upon an executive officer, and allows him, in executing the ordinance, to make unjust and groundless discriminations among persons similarly situated (*State ex rel. Garrabad v. Dering*, 84 Wis. 585, 54 N. W. 1104); second, because the power to regulate saloons is a lawmaking power vested in the village board (Stats. 1898, sec. 893, subd. 26), which cannot be delegated. A legislative body cannot delegate to a mere administrative officer power to make a law, but it can make a law with provisions that it shall go into effect or be suspended in its operation upon the ascertainment of a fact or state of facts by an administrative officer or board. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. W. 738; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm., ante, p.* 146, 116 N. W. 905. In the present case the ordinance by its terms gives power to the president to decide arbitrarily and in the exercise of his own discretion when a saloon shall close. This is an attempt to

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vest legislative discretion in him, and cannot be sustained.

"It is said that the latter clause of the ordinance may be stricken out as unconstitutional, and the balance, requiring saloons to close at 11 o'clock, may still be held valid. This, however, cannot be done, because it is very plain that the clause giving the president power to suspend the operation of the law at will is a compensation for the first clause. They are bound together, and the invalid clause was evidently a material inducement to the otherwise valid portion. *State ex rel. Walsh v. Dousman*, 28 Wis. 541."

Milwaukee v. Ruplinger, 155 Wis. 391, at p. 397, while denying the application of the principle to the instant case, condemns—

"power to act arbitrarily so as to suppress the business of keeping junk shops instead of regulating it, or to pass favorably upon one candidate for a license and unfavorably upon another under the same or similar circumstances, or to do otherwise than, having the 'good order of the city' as the objective, pass reasonably upon the suitability of a candidate for license, within the field of that discretion which is administrative as distinguished from legislative, and acts upon judgment as distinguished from acting upon mere whim, prejudice, or caprice."

The court says truly—

"It is not always clear as to whether a power is legitimately conferred because administrative or illegitimately bestowed because legislative."

State ex rel. Garrabad v. Dering ,84 Wis. 585, at page 595:

"The discretion with which the council is vested is a legal discretion, to be exercised within the limits of the law, and not a discretion to transcend it or to confer upon any city officer an arbitrary authority, making him in its exercise a petty tyrant."

VI

ASSUMING THAT THE PRESIDENT WAS GIVEN THE RATE MAKING POWER BY THE ACT IN QUESTION, IT WAS NOT DELEGATED BY HIM TO THE POSTMASTER GENERAL.

We have already seen that the terminology employed in the joint resolution of Congress was not such as would naturally vest the President with the powers of rate making; that the language, rather, was calculated to create a legislative receivership; that had Congress intended to give him the rate making power, the phrase, "to regulate the rates," or "to fix the rates" would have been inserted in the resolution, and have taken the matter out of all controversy; that it is apparent that whatever relief and benefit was to be obtained was sought through speeding up and improving the efficiency of the management of the utility as it stood; that a revolution in operation was intended, perhaps, but not a revolution in existing governmental agencies. The failure to provide any machinery for the ascertainment and determination of what a just and reasonable rate should be; the sweeping aside with one act the elaborate and extensive organization developed

through the slow fruition of years, and the substitution therefor of the unregulated will of a single individual—all of these considerations seem to us to conclusively negative the thought that such power was conferred. But be this as it may, whatever the power given to the President was, it is only the quantum of power passed on by him to the postmaster general with which we are concerned in this action, and it does not necessarily follow that, even if the President was completely invested with the rate making power, he has seen fit to pass that power on to the postmaster general. In fact, it seems to us that the wording of the Presidential proclamation clearly indicates that the President at least intended that the management by the postmaster general should be a species of federal receivership, as we have contended.

Paragraph 2 of the proclamation provides "that the supervision, possession, control, and operation of such telegraph and telephone systems * * * shall be exercised by and through the postmaster general." It then provides that the said postmaster general may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, *through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems.* As we read this sentence, giving the words employed their natural, ordinary, reasonable meaning, the conclusion is unescapable that whatever power the postmaster general was to receive or possess was to be exercised through the existing management of the

telegraph and telephone systems. Indeed, the next sentence expressly provides that the owners should "continue the operation thereof in the usual and ordinary course of the business of said systems," until the postmaster general should otherwise provide, emphasizing, as we think, the idea that the existing and orderly scheme of things was to be disturbed just as little as possible; that whatever regeneration or betterment or improvement of service was to be had, was to be arrived at through the medium of existing organizations, guided or supervised, stimulated and infused by one centralized, coordinating, controlling power.

Whatever the power conferred upon the postmaster general may be, that power may be exercised through the existing management. The court need not go the full length to which we ask, that the power delegated to the postmaster general can *only* be exercised through the owners, managers, boards of directors, receivers, etc., of the telephone systems. Possibly this is incorrect, but it is absolutely clear that the power with which the postmaster general was invested by the order of the President was such that the postmaster general *may perform the duties hereby and hereunder imposed upon him through the owners*, etc. In other words, it is clear from the reading of the Presidential proclamation that *all* of the power that the postmaster general received, if not necessarily, might be, exercised through the owners, managers, etc. This is sufficient, it seems to us, to stamp the indelible character of the power. The court need not find that the existing organization is the exclusive

medium for the exercise of the power. It is enough if it is a permissive vehicle through which the fullest quantum of power may be exercised, for then it can only be such power as is ordinarily exercised through managers—not power ordinarily exercised through regulating commissions.

Necessarily and naturally the power which may be exercised through owners, managers, boards, etc., is managerial power, is operating power, is power in the conduct of business. Is it not perfectly obvious and apparent that if the rate making power had been conferred upon the postmaster general and it was left optional with him to leave such power with the various public utility commissions, the President, who seems to have been industrious in the enumeration of instrumentalities through whom the power might be exercised, would have gone further and specified that until he should otherwise determine, the rate making power might be exercised through the various regulating commissions? This was provided in the Presidential proclamation of December 26, 1917, under which the railroads were taken over. Such language would have been an apt and appropriate expression of the idea which it is now contended the President sought to express. It surely cannot be argued that there was any intention to confer additional prerogatives or power upon the owners, managers, and boards of directors. And we deem the conclusion inevitable, therefore, that the power conferred upon the postmaster general was such power, and such power only, as might appropriately find expression through the activities of the owners, managers, etc.

VII

RATE MAKING POWER, IF GRANTED BY JOINT RESOLUTION, VESTED IN PRESIDENT PERSONALLY, AND CANNOT BE DELEGATED.

As a second and additional proposition, we assert that the discretion imposed by the joint resolution was by it vested in the President personally, and that under elementary principles the President cannot divest himself of that discretion by imposing or conferring it upon someone else.

So that, even if the joint resolution be construed as conferring upon the President the power to fix rates, the President has no power to re-delegate the discretion confided in him.

Such is the rule announced by many courts.

Lord v. City of Oconto, 47 Wis. 386. This case involved the construction of ch. 104 of the Private & Local Laws of Wisconsin, which was an act to authorize the city of Oconto to extend and maintain a pier into the waters of Green Bay. Section 14 thereof provided:

> "The mayor and common council shall have power to regulate the toll upon said pier and road, and such toll shall be applied to the repairing and expenses of collecting said tolls. The balance of said tolls shall be applied to the payment of the interest on said bonds, then the principal."

An attempt having been made to lease the pier so constructed and confer the power to fix tolls, the

court held this agreement unquestionably void, saying at page 388:

> "The power to regulate the tolls was vested *solely*, by the legislature, in the mayor and common council, and such power could not be delegated by the common council alone, or jointly with the mayor, to any other officers or persons by lease or otherwise. This principle is elementary, and scarcely needs the support of reported cases, but is most distinctly recognized in all of the cases upon the subject."

Smith v. Black, 115 U. S. 308, at 319:

> "Where there is a statute requiring a thing to be done by a known and responsible public officer, it may well be held that he must do it in person."

Muir v. Louisville & N. R. Co., 247 Fed. 888, 894. Considering the parallel situation arising under the act for the control of railroads and the authority of the director general thereof, prior to the enactment of the legislation of March 21, 1918, construing the act of Congress which authorized the President "through the Secretary of War to take possession and assume control," the court says:

> "Besides being an appropriate function of the War Department, it was the plain meaning of the statute which Congress enacted that the War Department should have authority over it, and even if we assume (which is inconceivable) that the Secretary of War declined for that department to take up the war work indicated we find nothing in the statute which authorizes it to be taken up by the Treasury Department, nor by a Director General of Railroads; Congress not having intrusted the work to either. And the situation, if strict rules were to operate, might involve consideration of

the question whether the rule states by the Supreme Court in *Smith v. Black*, 115 U. S. at page 319, 6 Sup. Ct. 56, 29 L. Ed. 398, to the effect that, 'where there is a statute requiring a thing to be done by a known and responsible public officer, it may well be held that he must do it in person,' would not apply.

Rhodes v. Tatum, 206 S. W. 114, says of this decision:

"It was doubtless this criticism of the act which induced Congress to pass the law of March 21, 1918, and we think this act cures the defects in the former act discussed by Judge Evans."

29 *Cyc.* 1433.

"Discretionary or judicial powers, finally, may not in the absence of statutory authority be delegated."

Clark v. Washington, 12 Wheat. 40, at p. 52:

"The charter enacts, 'that the corporation shall have full power and authority' 'to authorize the drawing of lotteries, for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; provided, that the amount to be raised in each year shall not exceed the sum of $10,000. And provided also, that the object for which the money is intended to be raised, shall be first submitted to the President of the United States, and shall be approved of by him.' "

That the language did not authorize an assignment or delegation of the power to conduct such a lottery was held by the court, in the following language:

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"There is great weight, too, in the argument that it is a trust, and an important trust, confided to the corporation itself, for the purpose of 'effecting important improvements in the city,' and ought, therefore, to be executed under the immediate authority and inspection of the corporation. It is reasonable to suppose that congress, when granting a power to authorize gaming, would feel some solicitude respecting the fairness with which the power should be used; and would take as many precautions against its abuse, as was compatible with its beneficial exercise. Accordingly, we find a limitation on the amount to be raised, and on the object for which the lottery may be authorized. It is to be for 'any important improvement in the city,' which the ordinary funds or revenue thereof will not accomplish; and is subjected to the judgment of the President of the United States. The power thus cautiously granted is deposited with the corporation itself, without an indication that it is assignable. It is to be exercised, like other corporate powers, by the agents of the corporation, under its control. While it remains where congress has placed it, the character of the corporation affords some security against its abuse; some security that no other mischief will result from it than is inseparable from the thing itself. But if the management, control, and responsibility may be transferred to any adventurer who will purchase, all the security for fairness, which is furnished by character and responsibility, is lost."

Kinney v. Howard, 133 Ia. 94, at 105:

"Where the act to be done involves judgment or discretion, it cannot be delegated to an agent or committee." Citing *Lord v. Oconto*, 47 Wis. 386; *Lauenstein v. Fond du Lac*, 28 Wis. 336.

Mechem on Public Officers, Sec. 567:

"This rule applies also to public officers. In

those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he can not delegate his duties to another."

City of Jacksonville v. Ledwith, 7 So. 885 (Fla.), at p. 891:

"A public duty which the legislature has confided to the deliberative judgment or discretion of the law making power of a municipality cannot be delegated by the latter to the judgment or discretion of one constituent element of that power, nor to the judgment or discretion of others. To permit it to be done would be to defeat the will of the legislature as to whose judgment or discretion should direct the subject-matter of the duty confided."

Arnold v. Pawtucket, 41 Atl. 576, at p. 578:

"Being powers, then, in the exercise of which the inhabitants of the district are beneficially interested, the exercise of such powers is mandatory; and this, too, though the language of the statute is permissive and not imperative. (Citing cases). If mandatory on the district, it necessarily follows that the district cannot delegate the exercise of such powers to the city of Pawtucket. The rule that powers of this nature cannot be delegated has been so often applied as to have become almost elementary."

Mechem on Agency, Sect. 313.

"Purely administrative or ministerial powers may be delegated, but wherever judgment and discretion are to be exercised,—where legislative pow-

ers are involved, where rates are to be fixed, policies determined, and the like—there the body or officer entrusted with the duty must exercise it; it cannot be delegated or farmed out."

McQuillin, Municipal Corporations, Sec. 382.

"Therefore, the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others."

Beer Co. v. Massachusetts, 97 U. S. 25, at p. 33:

"The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama*, 94 U. S. 645."

State ex rel. Nehrbass v. Harper, 162 Wis. 589, at 593:

" 'Under our constitutional form of government the legislature cannot delegate legislative powers to any officer or to any body of persons, individual or corporate, aside from the power to confer local legislative and administrative powers on county boards and municipal corporations.' *State ex rel. Carey v. Ballard*, 158 Wis. 251, 257, 148 N. W. 1090.

"If the state cannot delegate such power, certainly a common council cannot redelegate legislative power properly delegated to it."

Kohl v. Beach, 107 Wis. 409, at 415-416:

"True, an agent may employ others to assist him in the purely ministerial and unimportant details

of his employment, but not to do the essentials of the agency, involving the skill, intelligence, responsibility, and judgment that is at the very bottom of the employment. The special confidence reposed in the agent as to such matter precludes him from delegating his trust to others, except upon some express understanding with his principal."

Hitchcock v. Galveston, 96 U. S. 341, at 348:

"It is true, the council could not delegate all the power conferred upon it by the legislature, but, like every other corporation, it could do its ministerial work by agents. Nothing more was done in this case."

Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385.

Head Note: "Municipal corporation authorized by charter to pass ordinances directing streets to be improved 'in such manner as they may prescribe,' must presc ibe by action of the common council the manner of making an improvement directed by an ordinance; and can not authorize it in general terms, leaving the manner of making it to be determined by administrative officer."

Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105, at pp. 106–107:

"If discretion and judgment are to be exercised, either as to time or manner, the body or officer intrusted with the duty must exercise it, and cannot delegate it to any other officer or person. * * * The council directed, not in a specific case, but in all cases, that the superintendent of streets should 'cause the work to be done,' thus delegating the precise authority conferred upon it. The charter conferred the power upon the council to cause it to be done by *contract or otherwise*. This requires

the exercise of discretion and judgment as to the manner in which the work should be done. Whose judgment is to be exercised? The legislature has said that it is the judgment of the council, but the latter has attempted to invest the superintendent of streets with its exercise. This they had no power to do."

Runkle v. United States, 122 U. S. 543, at 557:

"This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another."

VIII

DOES ATTEMPT BY PRESIDENT TO DELEGATE ALL, OR AS IN THIS CASE, MORE THAN THE DISCRETION VESTED IN HIM ENTIRELY INVALIDATE PROCLAMATION, SO AS TO CONFER NO AUTHORITY ON POSTMASTER GENERAL AT ALL?

Can the Presidential proclamation be construed as a valid delegation of any authority at all to the postmaster general?

So far our argument has proceeded upon the theory that the language of the proclamation should be so construed and must be construed, if it is to be saved from unconstitutionality, as, according to the

postmaster general, merely the right to make decisions in the management of the property, such as the private owners would be authorized to make, but not of an arbitrary character in a governmental sense.

We have assumed that it *might* be so construed. To our mind there is serious doubt whether this be true. We recognize of course as phrased in *Wilcox v. Jackson*, 13 Peters 497: "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." And that as was said in *Williams v. The U. S.*, 1 How. 290, it would be utterly impracticable for him to "become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services."

In the present case, we have an act of Congress which we will assume invests the President with the very broadest possible discretion, as contended for by the telephone company and the Government. Note the language:

> "The President * * * is authorized and empowered, whenever *he* shall deem it necessary * * * to supervise or to take possession and assume control * * * and to operate * * * in such manner as may be needful or desirable."

(a) The language of the presidential proclamation confers all the discretion vested in him.

If this does grant such broad discretion to the President in the matter of dealing with the various wire systems, is it not obvious that this discretion is essentially and inherently of a personal character,

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that while of necessity many of the details of the Presidential operation must be worked out through subordinates and it cannot be expected that the President shall be burdened with all of the details of management and supervision, does not his proclamation in the present case undertake to do very much more than that? It specifically provides:

"It is hereby directed that the supervision, possession, control, and operation * * * shall be exercised *by* and through the Postmaster General."

And again:

"Said Postmaster General may perform the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as *he* shall determine."

And again:

"Until and except so far as said *Postmaster General* shall from time to time by general or special orders otherwise provide * * *."

And again, as to dividends, the same may be paid: "until and unless the said *Postmaster General* shall from time to time, otherwise by general or special orders determine."

And again:

"By subsequent order of said *Postmaster General* supervision, possession, control, or operation, may be relinquished in whole or in part * * *."

And finally:

"From and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone

systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Post-General without further act or notice."

First, we find the broad general statement phrased in terms of the joint resolution itself, by which the President states in so many words that all of the powers enumerated shall be exercised "by and through the postmaster general;" then, language subsequently following, delegating to the postmaster general the absolute discretion as to whether he shall continue the exercise of the power at all.

In our judgment, the discretion of the postmaster general expressed in the Presidential proclamation is as broad as that which called forth the condemnation of the court in *People v. Klinck Packing Company*, 214 N. Y. 121, at 138:

> "The question whether the statute shall take effect in any, all, or no cases is left wholly to his volition. Under its terms he has the power without check or guidance, so far as we can perceive, to veto the entire clause and decide that its benefits shall never be extended to any case although it comes within the precise terms of the statute, or to permit the exemption in one case and deny it in another precisely similar one."

Congress having shown its unlimited faith in the discretion of the President, giving him absolute power to operate the lines as he saw fit, vested *him* with that discretion. To say this is a wholly and totally different thing from saying that a broad expression of confidence and a broad discretion invested in him was equivalent to granting him the

authority not to exercise the power at all himself, and to effectually attempt to divest himself of discretion, and confer *all* the discretion sought to be imposed upon someone else, in whom Congress might or might not have had the confidence that it had in the President.

In the present case, it should be remembered that there is no existing office or medium to which the discharge of the contemplated duties are clearly appurtenant. It is not of the character of an act authorized to be done by the President with reference to a military reservation for the administration of which the Department of War exists, and which power is to be exercised by the President through the Secretary of War, or like an act with reference to the public lands directing that the President shall ascertain or determine certain things, and there being a Department of the Interior, his exercise of discretion or determination may properly be made through that medium. Here is a case where there is no existing medium or agency at all, and the appointment of the President, or the delegation of this power to the President, is *sui generis*.

The fact that the President was selected was not inherent in the situation at all. Congress might just as well have selected one of the governors of an existing state, or might have selected the head of an existing telephone system. Had this been done, could it then be successfully argued that such head of the telephone system or such governor could by proclamation have delegated all the power entrusted to him to the postmaster general, or to some other

governor, or any other individual not selected or designated by Congress. The confusion of thought incident to looking upon this as a discharge of function by the commander-in-chief of the army and navy should be avoided. The President, in the performance and discharge of this particular power, is acting merely in a delegated capacity as the representative of Congress, and he can no more delegate all of the power and discretion vested in him by Congress than he could, in the first instance, have legislated by executive fiat.

The language of *Muir v. Louisville & N. R. Co., supra*, construing the original railroad act, which marked a stage in the development of railroad control parallel to that of the joint resolution we are considering, is especially pertinent. The quotation is from p. 895.

> "On its face the act of August 29, 1916, does not give authority to the President to make or promulgate a proclamation of any character. No one, however, could or would contend that he had not abundant authority to issue such documents whenever he thought it proper to give notice or information to the public. But such papers cannot have any effect as laws, in the absence of express constitutional or congressional authorization."

Nor does the act of May 20, 1918, save the situation. That act, as plainly appears, referred only to the redistribution of functions among executive agencies, including any functions, duties, and powers *hitherto* by laws conferred upon any executive department. Doubtless this was an attempt to validate the attempted creation of the Director General of rail-

roads, but in plain terms it referred to the redistribution of functions, not to the creation of functions, and refers expressly to those *hitherto conferred.* The maxim, *expressio unius est exclusio alterius,* Sutherland, Statutory Construction, sections 491—496, seems peculiarly applicable.

This being the situation, has such proclamation in this case any more force or effect than if it had been issued by the President of his own motion without any enabling legislation by Congress? It being clear that the President could not have made the promulgation in question without act of Congress, and there being nothing in the act of Congress authorizing it, does it not follow as a matter of necessity that it is a mere nullity? The cases we submit would be very clear authority that, had Congress endowed the President with the power to fix telephone rates, he could not without the retention of some supervision or control have delegated that power, any more than the governing body of a municipality could do. This situation is one of exact parity. A municipal council gets whatever legislative power it has from the legislature; the President derives whatever power he has from Congress; the rate commission gets its power from the legislature; the Interstate Commerce Commission derives its power from Congress. There is no question but what any or all of these bodies may, and in fact must, act through appropriate subordinates. But would it be argued for one moment that it would be competent for the members of the Interstate Commerce Commission to pass a resolution and give it to the press, announcing that

they would exercise their rate making powers "by and through" one of the justices of this court; or that the Interstate Commerce Commission would exercise its power "by and through" the postmaster general?

We do not think that it will be argued that the President under the terms of the present act, might do what was done by the civil war act—that is, place under military control all the officers, and employes belonging to the telegraph companies, "so that they shall be considered as a post road and a part of the military establishment of the United States." Clearly, that would be the exercise of legislative power by the President. And yet, it seems to us, he would have just as much power by proclamation to, constitute the existing telephone and telegraph organizations a part of the army, as he has to say that he will invest the postmaster general with *all* the authority that has been delegated to or imposed upon him. He could do one no more than the other, and in our judgment, he is powerless to do either.

(b) The proclamation, construed as a legislative enactment, undertakes to confer greater discretion than the President himself received.

Assuming that the Presidential proclamation is authorized, then we suppose we are to test it as a legislative enactment should be tested. And under this rule it seems clear to us that the legislature itself could not have done directly what the Presidential

proclamation here assumes to do. The proclamation, as we have seen, imposes the absolute discretion on the postmaster general as to "how long, to what extent, and in what manner" he shall exercise his powers through the owners, managers, or boards of directors, and again provides that "by subsequent order" he may relinquish in whole or in part the "supervision, possession, control, or operation" which is hereby assumed. And nowhere is he limited to doing these acts in the interest of the national security or defense.

The Presidential discretion is by the express terms of the resolution a limited one. The discretion of the postmaster general by the express terms of the proclamation is an unlimited one.

As was said in *Sheldon v. Hoyne*, supra—

> "It places in the hands of the * * * designated officer power to say who shall be amenable to the law, and this, too, without any limitations, directions, or fixed rules as to the exercise of his discretion."

Is not the language in the case of *State v. Butler*, (Maine) 18 Am. & Eng. Ann. Cas. 487, directly applicable? Does not the Presidential proclamation in express terms provide, paraphrasing the language of that case: "It leaves the existence or non-existence of" government control wholly to the discretion of the postmaster general? In the language of that case, "He is not required to find any fact. He need not give any reason or have any reason." "Supervision, possession, control, or operation" are "to be continued or not, at his pleasure."

Continuing, he might even continue or abandon it "for the purpose of blocking" the efficient prosecution of the national defense. Still paraphrasing, "True, no such action by" the postmaster general "is to be anticipated, and true also that the" President "undoubtedly assumed" the postmaster general would use the power only for the prosecution of the national defense, but he could use it to cripple the national defense, and most effectually if the proclamation were valid. And, as that case concludes:

"The test is what he could do, not what he probably or undoubtedly would do."

Meade v. Dane County, 155 Wis. 632, at 639:

"An invalid statute is not rendered valid merely because those whom it attempts to authorize will probably have too much good sense to avail themselves of such authority."

People v. Klinck Packing Co., 214 N. Y. 121, 138–139:

"Of course, it is not to be assumed that the commissioner of labor would intentionally be arbitrary and unreasonable in the exercise of this power, but nevertheless the legislature has attempted to confer upon him the opportunity which would permit of these shortcomings and we are to judge of a statute by what is possible under it. In the absence of any guide it might very well happen that an administrative officer with the best of purposes would nevertheless be very fallible in the execution of them."

(c) Rule of law that clauses giving the Postmaster General power evidently a material inducement to valid parts of proclamation, and therefore whole proclamation void.

And because the court cannot say that the President would have granted the power without this unlimited and illegal discretion does it not follow that the postmaster general has no power in the premises at all?

See *Little Chute v. Van Camp*, 136 Wis. 526.

The rule contended for is given in 36 Cyc. 976–977:

> "It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other that which is constitutional may stand, while that which is unconstitutional will be rejected. The rule is, however, subject to several important limitations, and the whole statute will be declared invalid where the constitutional and unconstitutional provisions are so connected and interdependent in subject-matter, meaning, and purpose that it cannot be presumed that the legislature would have passed the one without the other."

The Wisconsin court has followed this in State ex rel. *Walsh v. Dousman*, 28 Wis. 541. Here the legislature passed an act creating an auditor for Milwaukee County, whose duties took from the supervisors much of their power in allowing accounts and making contracts. Law held unconstitutional, as it violated Article IV, Section 23, providing for one uniform system of town and county governments.

> "The law on this subject, as settled by this court, is, that in such cases, where the void parts of the

statute were evidently designed as compensation for, or inducements to, the valid portions thereof, so that the whole taken together warrant the belief that the legislature would not have passed the valid portions alone, the whole statute should be held inoperative." p. 547.

The valid functions of the auditor here were of so little importance or benefit to the county that the court did not believe they were the inducement for the act, and so held the whole thing void.

In *Warren v. Mayor and Aldermen of Charleston*, 2 Gray (64 Mass.) 84, the facts are not similar to our case, but the court by Shaw, Chief Justice, well expresses the principle contended for on pp. 98, 99 of the opinion:

"It is no doubt true, as has been argued by the learned counsel for the prosecutors of this writ, that the same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others. * * * But this must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

The Supreme Court of the United States, in *Poindexter v. Greenbow*, 144 U. S. 270, 304, says:

"It is undoubtedly true that there may be cases

where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact."

See also *Sheldon v. Hoyne, supra.*

Head Note 8: "If the unconstitutional part of a statute so limits the remainder that when considered apart from the unconstitutional part it differs essentially in its operation and effect from the whole law, including the unconstitutional part, the act is invalid as a whole."

(d) Nor can the Presidential proclamation be saved by resort to the preamble.

The rule permitting examination of the preamble of a statute is familiar.

Lackland v. Walker, 151 Mo. 210, 52 S. W. 414.

"While a preamble may be looked to in some cases to elucidate a statute, this can only be done where there is need for elucidation. The doubt or ambiguity in question must arise from, or exist in, the body of the act, and the preamble cannot be invoked to create the conditions precedent to its consideration in the premises."

36 *Cyc.* 1132.

"But where the enacting part of the statute is unambiguous, its meaning will not be controlled

or affected by anything in the preamble or recitals."

Yazoo Railroad Co. v. Thomas, 132 U. S. 174, 188:

"Again, the preamble to the act is referred to by counsel, as sustaining their construction, because it is therein declared that the work is one of 'great public importance,' and 'to be encouraged by legislative sanction and liberality.'

* * *

"But as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up."

Price v. Forrest, 173 U. S. 410, at 427:

"Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions. *United States v. Fisher*, 2 Cranch 358, 386; *United States v. Palmer*, 3 Wheat. 610, 631; *Beard v. Rowan*, 9 Pet. 301, 317; *Holy Trinity Church v. United States*, 143 U. S. 457, 462, *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550."

Sutherland, Statutory Construction, Sec. 341, p. 654:

"The preamble may explain an equivocal expression used in the enacting part, but it can never control its obvious meaning, nor supply matter

not within the spirit and meaning of the statute itself."

Within the rule of these decisions, there can be neither necessity nor occasion for resort to the language of the preamble of the Presidential proclamation, as it in plain terms, without reservation or condition, undertakes to confer upon the postmaster general the right to exercise unlimited power without restriction, condition, or reference to any occasion or contingency arising out of the national welfare, the national security, the national defense, or anything outside of the unadulterated whim of the postmaster general himself.

We conclude, therefore, that the authority of the postmaster general can only be saved, if it can be saved at all, by adopting the construction for which we have argued, and rejecting that for which the defense and the Government contend. And in the light of further investigation and reflection, we record our doubt as to whether it can be so saved.

IX

PRACTICAL CONSTRUCTION OF THE LAW BY THE POSTMASTER GENERAL AND THE TELEPHONE COMPANIES, AS ILLUSTRATED BY COMPENSATION AGREEMENT.

That contemporary construction of a doubtful statute may be entitled to great weight and decisive of the true construction is elementary.

Sutherland, *Statutory Construction*, secs. 472, 473, 474;
Black, *Interpretation of Laws*, p. 289, sec. 92.

1. In compensation agreement with telephone companies.

The position of the defendant telephone companies is that, during what they characterize as the period of federal operation, the laws of the states with reference to the operation of telephone companies are not applicable to the operation of the defendants of their telephone lines and have not been applicable thereto since midnight of the 31st day of July, 1918.

This, of course, is a mere conclusion of the pleader, but it takes the only logically permissible position. That is, that all laws, regulation, and control of the telephone business are suspended *ad interim;* that the Government is operating the telephone system as a governmental agency, freed from all restraint except as expressly specified in the act of Congress in the

not within the spirit and meaning of the statute itself."

Within the rule of these decisions, there can be neither necessity nor occasion for resort to the language of the preamble of the Presidential proclamation, as it in plain terms, without reservation or condition, undertakes to confer upon the postmaster general the right to exercise unlimited power without restriction, condition, or reference to any occasion or contingency arising out of the national welfare, the national security, the national defense, or anything outside of the unadulterated whim of the postmaster general himself.

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matter of taxation and certain minor police regulations. According to their theory and construction of the act, nothing else is saved to the state. It is the exercise of a function of government pure and simple, and any interference therewith and any suit brought by reason thereof is an assault upon the sovereign power of the United States.

(a) As to suits against company.

The effect of this doctrine, of course, would be that no employe of the telephone system would have any right of action for injuries received against the telephone company, during the period of federal operation, because his action would necessarily be brought against the Government, and the Government has not consented to be sued with respect to such injury.

No claim, we suppose, will be made that the postmaster general has any right to give his consent that the Government of the United States may be sued. On the contrary, we suppose it is established without question that such suit must receive formal authorization by Congress before it can be brought. This is established by repeated decisions.

39 *Cyc.* 776.

"Consent by the United States to be sued must be evidenced by an act of congress, and government officers cannot waive its privilege in this respect, or lawfully consent that such a suit may be prosecuted so as to bind it."

Stanley v. Schwalby, 162 U. S. 255.

Head Note 1: "Neither the Secretary of War, nor the Attorney General, nor any subordinate of either, is authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers."

This being the situation, it becomes interesting to see what construction the parties themselves have put upon the character of federal possession and control. We find at page 14 of the compensation agreement between the postmaster general and the American Telephone & Telegraph Company, of which some of the defendant companies herein are a constitutent part, and to which they have expressly consented and agreed to be bound, that it is provided that the postmaster general—

"shall also pay or save each such Company harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of Federal control or of anything done or omitted in the possession, operation, use or control of its property during the period of Federal control, except judgments or decrees founded on obligations of such Company to the Postmaster General or the United States."

This can only be construed as an express recognition that the character and quality of federal operation and control is such that actions and proceedings may still be brought against the corporation, because it recognizes the possibility of judgments on causes of

action arising out of things "done or omitted in the possession, operation, use or control." Such causes of action are not *created* by the agreement between the telephone companies and the postmaster general, because the postmaster general has no power to give his consent that the Government should be sued. Consequently, this can only be construed as an express recognition of continued liability to suit by the telephone company during the period of federal control, the same as previous to such control.

(b) In doing things necessary to preserve franchise rights.

Going further, we find that subdivision (f) provides:

"The Postmaster General shall save each Constituent Company harmless from any and all liability, loss or expense resulting from or incident to any claim made against it growing out of anything done or omitted during the period of Federal control in connection with or incident to operation or existing contracts relating to operations, and shall do and perform so far as is requisite during the period of Federal control for the protection of such Company all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or by reason of anything done or omitted thereunder, the forfeiture or loss by such Company of any of its property rights, ordinance rights, or franchises, or of its connecting or other contracts involving a facility of operation. The Postmaster General shall also save each Constituent Company harmless from any and all claims for breach of covenant heretofore entered into by it or by any predecessor in title or interest in any mortgage or other instrument in respect of insurance against losses by fire.

"Nothing in this or in the preceding paragraph shall be construed to be an assumption by the Postmaster General of, or to make him liable on, any obligation of any such Company to pay a debt secured by a mortgage."

Note particularly, the postmaster general—

"shall do and perform so far as is requisite during the period of Federal control for the protection of such Company all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or by reason of anything done or omitted thereunder, the forfeiture or loss by such Company of any of its property rights, ordinance rights, or franchises, or of its connecting or other contracts involving a facility of operation."

We contend that here again we have an express recognition of preexisting regulations of rates. This proposition is well illustrated by the situation existing, or that might have been held to exist, in the case of *Home Telephone Co. v. Los Angeles*, 211 U. S. 265. There a franchise was granted to the telephone company for fifty years—

"to be enjoyed in accordance with terms and conditions named, stipulates for certain free service for the city, and the payment to it, after five years, of two per cent of the gross receipts, and provides that the charges for service shall not exceed specified amounts."

In other words, here was a situation such as the agreement contemplates, one where "during the period of Federal control," the postmaster general expressly obligates himself to "do and perform * * * all and singular the things * * * necessary and

appropriate to prevent * * * the forfeiture or loss by such company of any of its property rights, ordinance rights, or franchises," which we think is equivalent to saying that the postmaster general expressly agrees to be bound by the previously existing municiapl regulations of rates, because he expressly agrees to do during the period of Federal control whatever is requisite to preserve the company's franchise, and one of the things so requisite to be done obviously is the matter of not attempting to infringe or exceed the provisions of the ordinance or franchise relative to the maximum rates of toll to be charged.

2. Contemporaneous and practical construction by failure to assert power of regulation durthe war.

This legislation has received both contemporaneous and practical construction by the official to whom its execution was intrusted. The law was enacted at no ordinary time in our national life; it was written and enacted and received its construction at the very crux and crisis of the war. Doubt and division were gone. A majestic people stood ready, if need were, "to take all the old sanctions of the law and the constitution and fling them to the winds," rather than see its determined purpose crossed and its brave armies beaten. The times called for action—immediate, decisive—for the exertion of every utmost shred of power, "needful or desirable" in the language of the resolution, for the national security or defense.

That was the one sole sustaining, permeating purpose of the law. Necessity stood at its flood tide then, and here was a charter of power to be read and acted upon in the flaring light of war that leaped and flamed its illumination of every nook and corner of legislative purpose. A day then might crystalize a policy as effectively, might give by practical construction a reflection of the power intended to be conferred, as decisively as a decade or more might do in normal times. And what do we find when the emergency was on, when the hour of anguish and anxiety and travail had struck? Was there any effort to exercise the power now asserted? Not at all. And this alone, we submit, is such definite, decisive and final demonstration of the true intent, purpose, and meaning of the act as to forever set at rest any question of its scope or purview. The postmaster general having decided when the war was on that the assumption of the rate making power was neither needful nor desirable for the national security or defense, he cannot now in these "weak piping times of peace" seek to assert a power which his own construction of the act at a time when such construction was decisive has forever set outside the bounds of legislative purpose.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

Dakota Central Telephone Company, a Corporation, Northwestern Telephone Exchange Company, a Corporation, Interstate Telephone Company, a Corporation, and South Dakota State Telephone Company, a Corporation,

Plaintiffs in Error,

vs.

State of South Dakota, ex rel. Byron S. Payne, as Attorney General, and John A. Murphy and F. W. Dougherty, as and Constituting the Board of Railroad Commissioners of the State of South Dakota,

Defendants in Error.

MOTION TO DISMISS.

GEORGE M. PAYNE,

CHARLES A. ...

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April 29, 1919.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

Dakota Central Telephone Company, a Corporation, Northwestern Telephone Exchange Company, a Corporation, Nebraska Telephone Company, a Corporation, and South Dakota State Telephone Company, a Corporation,

Plaintiffs in Error,

vs. No 967.

State of South Dakota, ex rel., Byron S. Payne, as Attorney General, and John J. Murphy and P. W. Dougherty, as and Constituting the Board of Railroad Commissioners of the State of South Dakota,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF OF DEFENDANT IN ERROR.

THE ISSUES.

By writ of error and writ of certiorari, the plaintiffs in error have brought this case into this Court to review the judgment of the Supreme Court of the State of South Dakota, rendered March 4, 1919, permanently enjoining the defendant telephone companies from putting into effect, charging or collecting for long distance or toll messages between stations within the state of South Dakota the toll rates which the defendants had proposed to establish and make effective on the 21st day of January, 1919, and also permanently enjoining the defendants from establishing within the state of South Dakota any toll rates for long distance telephone messages in excess of rates approved by the Board of Railroad Commissioners of that state.

The defendant Dakota Central Telephone Company and the South Dakota State Telephone Company are corporations organized and existing under the laws of South Dakota. The

defendants Northwestern Telephone Exchange Company and the Nebraska Telephone Company are foreign corporations duly authorized to transact business within and pursuant to the laws of South Dakota. All of the defendants are and for some time past have been, engaged in operating telephone exchanges and long distance lines and in transmitting toll or long distance messages between points within the state, for which they have been collecting rates established or approved by the Board of Railroad Commissioners, pursuant to the state laws. In this case there is no dispute that under the laws of South Dakota telephone companies are prohibited from increasing rates for intra-state telephone service, unless the proposed increased rates are first approved by the Board of Railroad Commissioners. There is no dispute that in the plan for making the proposed toll rates effective, the laws of South Dakota and the authority of the Board of Railroad Commissioners were entirely ignored and disregarded; and that the rates proposed would increase the established charges for intrastate toll messages by reason of the fact that such rates would be in many instances higher in amount than the rates previously in effect, and by reason of the further fact that the plan for the new rates contemplated new classifications of toll service which would result in increased toll rates. There is no dispute as to what is the state law, or as to what it provides, or as to the authority of the Board of Railroad Commissioners thereunder; and the construction of the state laws is not in any wise involved in this case. The case was submitted to the state Supreme Court for final decision upon the pleadings, upon the theory of both parties that there was no material controversy as to any question of fact.

The contention that the laws of South Dakota need not be complied with when the Government of the United States operates the telephones and attempts to control the rates thereof was decided adversely to the plaintiffs in error by the Supreme Court of South Dakota in this case. The opinion of the court does not contain a positive declaration upon that point, but necessarily the court's conclusion that the defendant in error was entitled to the injunction leads to the inference that in the court's opinion the laws of South Dakota still govern the defendant telephone companies with reference to their intrastate rates. More ac-

curately stated, perhaps, the opinion of the state court was that, even if the property of the defendants has become the property of the United States, and if the Government of the United States is operating this property, still "the Government's title thereto is encumbered by the reserved power of the state to regulate intrastate rates." That conclusion of the court is based upon its construction of the joint resolution of Congress of July 16, 1918, to which reference is hereinafter made.

The theory upon which the defendant in error brought this case against the telephone companies is that they are wrongdoers and stand in the position of trespassers proposing to invade and violate the exclusive realm of the state's jurisdiction, as declared and defined by the law of the land; and that, therefore, in the making of state rates, the Government of the United States cannot be said to be operating or controlling the property of the telephone companies in South Dakota. The argument that, under the laws of the state, the Board of Railroad Commissioners has no authority over the Government of the United States in the operation of telephones, assumes that the Government is engaged in their operation and control in the particular respect under investigation. To concede that proposition is to concede that the Government of the United States is rightfully exercising control of telephone companies in South Dakota in the making of intrastate rates. That is the ultimate question for determination in this case. If in establishing the proposed rates the President or the Postmaster General or the telephone companies are acting wholly without authority, then it follows that they are wrongdoers or trespassers and that in asserting its right to continue to regulate the rates for service within the state the defendant in error is not undertaking in any wise to regulate the Government of the United States or to regulate the telephones with respect to any phase of their operations under the control of the Federal government. This subject is more fully discussed at another place in this brief.

The ultimate question presented in this case is as to whether the laws of South Dakota are controlling under the facts of the case, or whether they have been superseded by any valid enactment of the Federal Congress, or by any lawful action of the President or Postmaster General, pursuant to Federal legislation.

The answer of the telephone companies is mainly one of confession and avoidance. Leaving for later consideration the question of the jurisdiction of the state Supreme Court, or of any court, to determine the questions of law presented, we find that the position of the plaintiffs in error is that the laws of the state of South Dakota prescribing the manner in which advances in telephone rates may be made effective within the state, cannot apply, because the Congress of the United States, by a joint resolution passed July 16, 1918, authorized the President of the United States, during the war, to take possession and assume control of and to operate, the telephone systems of the country; because on July 22, 1918, the President of the United States issued a proclamation declaring that on August 1, 1918, the telephone systems throughout the United States should be conclusively deemed to be under Federal control and vesting the management and operation of such systems in the Postmaster General; because thereafter the Postmaster General on August 1, 1918, took possession and undertook to manage and operate such telephone systems, and thereafter entered into contracts with these defendants and other telephone companies prescribing their compensation and certain terms and conditions under which he would operate them; and because, thereafter, on December 13, 1918, pursuant to the powers vested in him, the Postmaster General promulgated his Order No. 2495, Telegraph & Telephone Service Bulletin No. 22, prescribing the rates and the classifications applying in connection therewith, which the defendant telephone companies, as his agents and instrumentalities, proposed to put into effect in South Dakota on January 21, 1919. A copy of the contract between the Postmaster General and the Dakota Central Telephone Company dated the 23rd day of November, 1918, was attached to the answer, marked Exhibit B and made a part thereof, and it was alleged that similar contracts had been entered into with the Nebraska Telephone Company on October 14, 1918, and with the Northwestern Telephone Exchange Company on October 19, 1918; but that no contract had been entered into between the Postmaster General and the Defendant, South Dakota State Telephone Company. (Tr. of Record, Page 22.)

Whether or not the Postmaster General was authorized in any sense by the joint resolution of Congress passed

July 16, 1918, to establish intrastate telephone toll rates in South Dakota depends, firstly, upon the proper construction of that resolution; and, secondly, if it shall be determined that the resolution purports to grant to the Postmaster General that authority, then, upon the question of the power and authority of Congress, under the Constitution of the United States, to enact a statute vesting such power in the President or the Postmaster General.

POINTS

In this brief the defendant in error urges the following points:

1. Congress did not, in the Joint Resolution of July 16, 1918, attempt to deprive the State of South Dakota of the right to regulate intrastate rates of telephone companies. On the contrary, it expressly reserved to the state the right to continue its regulation of such rates, by means of its lawful police regulations. (1) The conditions existing and the state of the law in effect when the Resolution was passed; (2) the purposes sought to be accomplished by its passage, and (3) the language in which it is expressed, support this construction of the Resolution.

2. Congress was without power, under the Federal Constitution, to delegate intrastate rate making power to the President or the Postmaster General because such rate making is one of the inherent police powers of the states, and because the delegation of such power was not necessary and proper in carrying out any constitutional authority of Congress, the President or any Federal Officer. (1) Under the Commerce Clause, it is not possible for Congress or the President to interfere with state rate regulation except to remove unjust discrimination against *interstate* commerce; (2) Under the war powers, Congress or the President cannot exercise arbitrary power unrelated to war purposes; (3) Rate making is a legislative function which Congress was powerless to delegate to the President by means of the Joint Resolution of July 16, 1918.

3. The Supreme Court of South Dakota had jurisdiction. The suit is not one against the United States, the President or the Postmaster General; and its purpose was not to control revenue or property of the United States. The defendants are wrongdoers, and cannot defend upon the ground that they acted under orders which the Presi-

dent or Postmaster General was without authority to issue.

4. It is within the power of the courts to determine the limits of executive authority, and to restrain acts in excess thereof. Assertion of authority by an officer attempting to exercise it does not preclude the courts' jurisdiction to determine its existence. This suit is not one to control administrative discretion, but to restrain acts in threatened violation of law and in excess of legal authority.

ARGUMENT AND AUTHORITIES

1. Congress did not, in the Joint Resolution of July 16, 1918, attempt to deprive the State of South Dakota of the right to regulate intrastate rates of telephone companies. On the contrary, it expressly reserved to the state the right to continue its regulation of such rates, by means of its lawful police regulations. (1) The conditions existing and the state of the law in effect when the Resolution was passed; (2) the purposes sought to be accomplished by its passage, and (3) the language in which it is expressed, support this construction of the Resolution.

The joint resolution of Congress is the source from which the President and the Postmaster General derives the powers which the defendant telephone companies contend that the Postmaster General exercised in requiring them, as his instrumentalities, to put into effect and collect the toll rates and classifications of service specified in his Order No. 2495, of December 13, 1918. This resolution is as follows:

Joint Resolution July 16, 1918

"The President, during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided that just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person

entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five, of the Judicial Code: Provided further, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems. (July 16, 1918, c.—, 40 Stat.)"

Construction of the Joint Resolution

This enactment is to be construed according to the general rules for the construction of statutes. The determination of this case is almost entirely dependent upon the construction which the Court shall make thereof. The defendant in error contends that, under the second proviso in the said resolution, the President and the Postmaster General are prohibited from establishing intrastate telephone toll rates, and from in any manner interfering with or impairing the authority of the state of South Dakota or of its Board of Railroad Commissioners in the exercise of the lawful police regulations of the state to regulate intrastate telephone toll rates as completely as at any time in the past, except that any regulations of rates which the state, or its Board of Railroad Commissioners, might undertake to enforce must not affect the transmission of Government communications or the issue of stocks and bonds by the telephone companies. It is the firm conviction of the defendant in error that this construction of the resolution is supported, (1) by a consideration of the circumstances and conditions existing long prior to and at the time of passage of the resolution of July 16, 1918, based on settled principles of law as declared by the Supreme Court of the United States in decisions upholding the power and authority of the states in the exercise of their police powers to regulate and control intrastate rates of public utilities; (2) by a consideration of the purposes sought to be accomplished by

the resolution; and (3) by a careful consideration and analysis of the context of the resolution itself.

(1) What were the circumstances and conditions existing when the resolution was passed, in so far as the same shed any light upon the question as to whether or not Congress intended to authorize the President to control intrastate rates? It is well known that telephone companies, almost without exception, have received their charters from the several states, and that from the beginning their functions have partaken of the nature of those of common carriers; that they have been subject to state laws controlling their rates, practices and property, upon the theory that their business is one affected with a public interest, and that it is, therefore, like the business of railroads, express companies, ferries, wharfingers and others, a business in which the public has such an interest that it may, through its political government, control the conduct thereof in the interests of the general public. Telephone companies, as is well known, have been granted the important right of eminent domain, as well as the right to construct their lines upon and along public highways, streets and public property. These are rights which the states, and not the National government, have conferred upon them.

It is a matter of common knowledge that under this system, during the past few years, there has taken place a marvelous development of the telephone as a means of communication. Large companies have grown up and extended their operations over the entire nation. Small companies have been organized and have met the needs of small communities. Telephone lines have reached into communities far removed from the populous centers of business activities, and have met the social and the business needs of nearly every citizen of the country, for speedy and convenient means of communication.

The only regulation of telephone companies in the past has been regulation by the states. The Interstate Commerce Commission has jurisdiction over interstate telephone rates but it has never exercised such jurisdiction. Many times the courts of the several states and of the United States have been called upon to consider state regulation of the telephone business. Questions of service, questions of rates, and many other questions upon which state legislatures or state regulating commissions have acted, have been

presented to the courts for review. Invariably the courts have sustained the right of states to prescribe such regulations under their police powers.

The making and regulating of the rates of common carriers with respect to their intrastate operations has always been upheld by the courts as an exercise of the police powers of the states.

Union Dry Goods Company v. *Georgia Public Service Corporation*, (U. S.) 39 Sup. Ct. Rep. 117.

Wis. ex rel., Attorney General, v. *C. & N. W. Ry. Co., et al.*, 35 Wis. 425, 559.

Munn v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77.

Arkansas Rate Cases, 187 Fed. 290.

Reagan v. *Mercantile Trust Company*, 154 U. S. 413, 38 L. Ed. 1028.

Williams v. *Arkansas*, 108 S. W. 838, 26 L. R. A. (N. S.) 482.

Minnesota Rate Cases, 230 U. S. 352, 57 L. Ed. 1511.

Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636.

3 Bouvier's Law Dictionary, page 2808.

Freund on Police Power, pages 65, 378, 385.

IX Encyclopedia United States Supreme Court Reports, pages 540, 541.

(2) What were the purposes Congress sought to accomplish by the passage of the resolution? This court will take judicial notice of the fact that on July 16, 1918, this country had been in a state of war for fifteen months. The end was not yet in sight. The Government was summoning every resource of the Nation for the conflict. The railroads had been placed under Federal control because of their collapse under the abnormal demands of war conditions. It had been the thought of Congress and the Administration that by unifying the railroads and operating them as a continental system, without reference to the interest of originating lines, by a free exchange of equipment and by a more extensive use of short line mileage, much of the expense and effort incident to transportation by competing railroads could be eliminated, and a great increase in the efficiency of operation would result. Whether the same considerations controlled Congress in passing the resolution

of July 16, 1918, or not, it is impossible to say, for the reason, as is well known, that the public has never been told, and does not now understand, the reasons which induced the Federal Administration to request Congress to grant it authority to seize telegraph, telephone and cable lines. There was, of course, the probability that the telephone lines might collapse as the railroads had collapsed under the excessive burden of the demands of the war. Congress had authorized the President to take control of the railroads by an act passed August 29, 1916, and Federal control was not assumed by the President until December 28, 1917. Therefore, in the case of the railroads Congress looked forward more than a year into the future, foreseeing possible conditions which might make Federal operation and control needful or desirable. Likewise when it passed the Resolution of July 16, 1918, Congress may have been looking into the future, aiming to anticipate conditions which might make Federal operation and control of the wire lines needful and desirable. The controlling purposes of Congress, therefore, was to unify and utilize the telephone lines and property for the purposes of the Government in the event of an emergency such as that which arose and paralyzed the railroads of the country. Viewed in the light of the experience of the country during the last two years, there is reason for believing that centralized operation of utilities, such as railroads, express and telephone companies, might be advantageous to the Federal Government while actually conducting war. However, we submit that there is nothing in our experience to indicate in any way that the control and regulation of intrastate rates of public utilities has ever been in any way needful or desirable as an aid to the Government in the prosecution of war, except in so far as this regulation has always been limited in the sense that regulating commissions could not, without violating the Federal Constitution, require public utilities to perform a public service for a rate insufficient to insure it an adequate compensation. It cannot be doubted that under state regulation of telephone companies and of their rates, these companies had developed and extended their operations. The rates which they had in effect when the Resolution of Congress was passed had in many instances been established after, and as a result of, exhaustive investigations by bodies of men authorized by law and informed by

experience in the consideration of the questions growing out of rate regulation. In very many instances those rates had received the approval of the courts. Rates established under such circumstances were entitled to the presumption that they were reasonable and fair. The purpose, therefore, of Congress in passing the resolution could not have been primarily, or even incidentaly, to enable the telephone companies in time of war and stress to increase their earnings. It cannot be doubted that the controlling consideration with Congress in authorizing the President to control and operate the telephone systems of the country during the war was to enable him to use them to facilitate the handling of Governmental business, to the exclusion of private or commercial business, and otherwise to coordinate their facilities with other facilities under the Government's control for the more efficient and effective conduct of the Government's vast business of war. We submit that the regulation of the telephone companies' intrastate rates bears no remote relation to this controlling purpose and that the members of Congress who voted for the resolution and who discussed it in the houses of Congress were not of the view that in passing the resolution they were authorizing administrative officers of the Federal Government to invade the domain of states' rights or to deprive the several states of the important powers which they possessed for the control and regulation of purely domestic affairs.

(3) What does the resolution, and particularly the second proviso therein, mean? After authorizing and empowering the President, when necessary for the National security or defense, to take possession, assume control and operate telephone companies for the duration of the war, and after providing means by which the just compensation of the telephone companies for the use of their property by the Government of the United States should be determined, Congress added the following proviso:

"Provided further that nothing in this act shall be construed to amend, repeal, impair or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

This proviso unquestionably indicates that Congress,

in passing the resolution, gave consideration to the question of the power and authority of the states in the regulation of these utilities, under our National system of political organization. After enacting that the paramount purpose of the Government was to have its communications transmitted without state interference, and after providing that the issue of stocks and bonds by the telephone companies should be free from restrictions, imposed by any state, Congress declared that the laws, powers and police regulations of the states were to be not otherwise amended, repealed, impaired or affected by the act.

If Congress had intended that the President should have the authority to initiate rates for telephone, telegraph, cable or radio systems, it could very easily have said so. When Congress passed the Federal Control Act of March 21, 1918, it authorized the President, under certain conditions, to initiate rates. The omission of a corresponding provision from the resolution authorizing the President to assume control and to operate the telephone companies, very clearly indicates that the intention of Congress was not to confer upon the President the power to initiate telephone rates. Evidently it was not the view of Congress that the power to initiate rates was in any wise a necessary incident to the control or operation of the telephone lines and systems of the country during the war in the interests of National defense. When Congress had conferred upon the President power to consolidate and coordinate the operation of the several telephone systems, and the telephone systems with the telegraph, cable and radio systems, Congress was satisfied that it had accomplished the purpose for which Federal control and operation should, or could be, undertaken. Having done this much, and having provided in addition thereto for the method of determining the compensation that should be paid telephone companies and other wire companies, it then inserted the concluding proviso to indicate its intention that nothing in the resolution should constitute any authority, which the President could exercise, to amend, repeal, impair or affect the lawful police regulations of the several states, except that such regulations might not interfere with the transmission of Government communications or the issue of stocks and bonds.

Construction of "Lawful Police Regulations."

This controversy centers upon the construction of the

words "lawful police regulations," as used in this proviso. The plaintiffs in error contend that these words are to be interpreted in a limited sense so as to reserve to the states only such powers as they might possess for preserving and protecting the health, morals and safety of the public. The defendant in error, on the other hand; contends that this language is to be interpreted in the broad sense in which police regulations and police powers have been used and defined by the courts in many cases in which they have considered the nature of the power exercised by the states in the regulation of the property, affairs and rates of public utilities.

In its decision the Supreme Court of South Dakota expressed very appropriately its understanding of the term "lawful police regulations" as used in this proviso, as follows:

> "It cannot be doubted that the powers of a state to regulate the issuance of stocks and bonds by corporations created under its authority is a power entirely foreign to and outside of those powers included in the term 'police power' when such term is used in its narrow sense as referring to the power to preserve public safety, health and morals. Therefore, when Congress declared that the 'police powers of the several states' left to the states, should not 'affect the issue of stocks and bonds' of telegraph and telephone companies, it is clear that it had in mind reserving to the states 'police regulations' which, if unrestricted, might affect the issue of stocks and bonds. Thus Congress has by the very wording of this proviso declared that it reserved to the state, subject to two limitations, the full police powers which the states possess as sovereign states. The term 'lawful police regulations' is, therefore, self-interpreted by Congress and needs no interpretation by the courts."

In placing upon the exercise by the states of their police regulations the limitations that the same should not affect the transmission of Government communications or the issue of stocks and bonds it is clear that Congress did not have in mind merely regulations made for the preservation of health, safety or public morals, because regulations of that character could not possibly seriously affect transmission of Government communications or the issue of stocks and bonds. When it provided these limitations upon the

lawful police regulations of the states it had in mind regulations which the states might make, of a character which might naturally and appreciably affect the Government's use of wire lines or the issue of securities by the telegraph and telephone companies. It should be perfectly plain to everyone that what Congress had in mind, and what Congress foresaw, was the possibility that a restrictive policy of rate regulation by the states might impair the credit of wire lines to such an extent that the issuance of their stocks and bonds could not be made with reasonable assurance of finding a favorable market. Because lawful police regulations is a term sufficiently broad to comprehend, not only rate regulations, but service requirements, Congress added the provision that such regulations should not affect the transmission of Government communications. An unwise policy in the regulation of rates by states might result in such a depletion of the revenues of wire lines as to prevent the proper maintenance of such lines; or unwise requirements as to the furnishing of service and facilities for the public might interfere with the proper and necessary use of such lines by the Government for the handling of official communications. Congress, therefore, placed a limitation upon the exercise by states of the lawful police regulations in the control of service facilities and rates so that the handling of the Government's business might be in every way facilitated. Such a purpose was entirely consistent with the main purpose of the Government in asking for control and operation of the wire lines during the war; and that purpose, as stated before, was to place the property and facilities of the wire systems under the centralized control and operation of the Government, in order that the Government's business of every kind might be handled in the most efficient monner. These considerations led the Supreme Court of South Dakota, and have led the defendant in error, to the obvious conclusion that Congress, in placing these two limitations upon the exercise of the state's police regulations unquestionably regarded the lawful police regulations of the states as those broad powers which the states for many years had been exercising in their regulation of the properties and the rates of telephone and other wire companies. If Congress had been of the view that the term "lawful police regulations" was used in the resolution in the narrow sense in which the plaintiffs in error in this case contend

that it was used, then certainly Congress would not have said that such regulations should be limited so as not to affect the transmission of Government communications or the issue of stocks and bonds by the telegraph, telephone and other wire systems.

The first proviso in the resolution prescribed the means by which the just compensation to be paid to the wire systems should be determined for the supervision, possession, control and operation thereof by the President. Therefore and thereafter the Postmaster General, acting for the President, entered into contracts with three of the telephone companies who were made defendants in this case, in which the basis for such compensation was agreed upon. When Congress authorized the President to guarantee just compensation to the owners of these properties, Congress intended that the President should exercise such powers, and that thereby the Government of the United States should assume the obligation of paying for its possession, control and operation of the wire lines, such an amount or amounts as the President should deem to be just. When these agreements were entered into the telephone companies were no longer interested for the time being in the amount of the rates to be charged for their services. It is true that Federal control and operation was to continue only during the war and not byond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace. Therefore, the telephone companies would be greatly interested in the rates and classifications of their service in effect at the time of the termination of Federal control, but during Federal control the Government was to guarantee just compensation. How the Government should make good its guaranty was a matter of fiscal policy and not a matter of control or operation of the telegraph or other wire lines. In making such a guaranty the Government assumed an obligation, just as it has assumed many other obligations during the war, which it will be obliged to pay by revenues derived from one source or another. It is certain, at least, that the efficiency of Governmental supervision, control or operation of the telephone systems was not in the remotest degree dependent upon the manner in which the Government should raise the money to make its guaranty good. To say or to contend, therefore, that by the joint resolution Congress ever intended that the President or the Postmaster

General, or any one else charged with the actual operation of the wire lines during the war should have the power to reclassify the service and increase the rates and charges of such companies, and in doing so to deprive the states of those sovereign rights and powers which they have exercised from the beginning of telephone regulation in the interests of the public, is to argue to a conclusion wholly unsupported by the premises.

It was not necessary in the resolution of July 16, 1918, for Congress to determine the manner in which the Government should raise the funds to meet the guaranty which the President might make to the owners of wire lines for their use during the period of Federal control. That was a question which Congress could, and which Congress can, determine at a later date. Congress did not say in the resolution that the funds to meet that guaranty should be raised by rates to be established by the Postmaster General. That, however, is the provision which the plaintiffs in error are now undertaking to read into the resolution by construction and interpretation. That is the only basis for their contention in this case that the President or the Postmaster General has, or ever had, any authority to increase or otherwise regulate the rates or charges of telephone systems under Federal control.

It is conceded, and it will not be necessary to argue the proposition, that the resolution of July 16, 1918, is in no sense a revenue measure. It was not passed with the legal formalities necessary in the passing of a revenue law. Nevertheless, if the resolution means all that the plaintiffs in error contend that it means, it is a revenue measure, because, under their interpretation of it, it authorizes the collection of revenues with which the Government shall make good its guaranty of just compensation to the owners of the wire lines under its control.

If considered in its natural and most easily understood significance, the language contained in the concluding proviso of the resolution is most strikingly plain. It is not necessary to invent any complicated construction of this language. It says that the lawful police regulations of the states shall not be affected. It was passed at a time when, under their police powers and by means of police regulations, the states had been exercising effective control over telephone companies for years.

It is a most natural assumption that if Congress had intended to completely revolutionize these conditions and the relations of the states to these utilities which they had created, Congress would unquestionably have made that intention very clear by appropriate language in the resolution. If Congress had believed that it possessed the power to deprive states of the right to exercise police powers it is natural to assume that it would have said so in language that could not be misunderstood. Instead, however, of expressing any such belief Congress provided "that nothing in this act shall be construed to amend, repeal, impair or affect existing laws or powers of the state in relation to * * * the lawful police regulations of the several states." Congress could not have used language indicating more clearly its purpose to recognize the admitted right and authority of the states to continue as theretofore to control telephone companies through *lawful police regulations*. The only possible question that can arise in this connection is as to whether or not the term *lawful police regulations* embraces the control and regulation of intrastate rates of telephone companies. If the term *police powers* had been used in the resolution there would be no question that that term comprehended rate regulation; but the contention has been made that *police regulations* is a narrower term than *police powers*. The question is: What did Congress intend to do? If it be granted, as we believe it must, that Congress intended to recognize and preserve the states' rights under their police power to regulate telephones with respect to their intrastate operations, as they had regulated them up to the time of passing the resolution, then it must follow necessarily that "lawful police regulations" means and includes the power to prescribe and regulate intrastate rates. There was no reason why Congress should recognize the authority of states over telephone companies at all, except that Congress must have been cognizant of the constitutional limitations upon its powers to take away police powers of the states. Therefore, it used language in the resolution appropriate to express and define the known limitations of its powers. It said, in effect, that nothing in this act shall authorize the President to enter the realm of state regulation of these utilities. There was no occasion for inserting the term *lawful police regulations* in the resolution, except to assert thereby that Congress proposed to

exercise only the recognized and conceded powers of the Federal government, and disclaimed any purpose to invade or to exercise any of the conceded rights or powers of the states to regulate telephone companies by virtue of their police powers.

This construction, based as it is upon the circumstances under which the resolution passed is amply supported by definitions which the courts have given from time to time to the terms *police powers* and *police regulations.* In the reported decisions of the courts these terms are used interchangeably and indiscriminately in many cases. If any distinction whatever is recognized it is that police regulations relate to the exercise of police powers and that through police regulations police powers are applied. We do not find in the books any authority for any other difference in the significance of these terms.

Wisconsin, ex rel., Attorney General, v. *Chicago & North Western Railway Company, et al.,* 35 Wis. 425, 591.

Cooley's Constitutional Limitations, 577.

In his work on Constitutional Limitations, at page 577, in speaking of regulations of the rates and business of public utilities by the states, Judge Cooley said:

> "The limit to the exercise of the *police powers* in these cases must be this: the *regulations* must have reference to the comfort, welfare or safety of society. * * * That is they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise."

The foregoing definition was approved by the Supreme Court of Wisconsin in *Attorney General* v. *Chicago & North Western Railway Company,* supra.

In 31 Cyc. 903, the definition of police regulation and regulations is as broad as any definition ever made of the term *police power.* It is there said:

> "Police Regulation or Police Regulations. The term which is used to define the power which resides in the states. In the plural, such provisions of law as are designed to protect the lives, limbs, health, comfort and quiet of citizens, and to secure them in the enjoyment of their property."

Police powers and *police regulations* are terms used to convey the same thought in the text of Freund on Police

regulations as impairments of obligations the author refers to regulation of railroad rates as an example of police regulation in the following language:

"It is not an objection to an otherwise valid *police regulation* that it makes the performance of a contract valid in its inception impossible. Thus the power of the state to *regulate railroad rates* is not defeated by the fact that the railroad company has made a contract * * * that it will not charge less than the rate fixed * * * by statute."

As one of the illustrations "of the power in the states to make regulations affecting commerce which are sustainable as regulations of police," Judge Cooley, in his work on Constitutional Limitations, page 851, cites in the notes railroad rate regulation cases, including *Attorney General v. C. & N. W. R. Co.*, supra, *Munn* v. *Illinois*, supra, and *Railroad Company* v. *Fuller*, 17 Wall. 560.

Other cases in which "police regulation" is used in the same sense as "police powers," include the following:

Smyth v. *Ames* 169 U. S. 466, 42 L. Ed. 819.

Hammer v. *Dagenhart*, 247 U. S. 251, 38 Sup. Ct. Rep. 529.

In Fuller on Interstate Commerce, at page 17, there is a discussion of the term *police power*. The text refers to the License Cases and contains a quotation from the decision of the United States Supreme Court in those cases as follows:

"What are the police powers of the state? These are nothing more or less than the powers of the Government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law or a law to punish offenses or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own borders, in every case it exercises the same power. * * * It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as is its power to pass health laws, except insofar as it has been restricted by the Constitution of the United States."

It thus appears that in the resolution of July 16, 1918, Congress used language which appropriately expressed its policy and its conviction, as a principle of Constitutional law, that the states should not, and could not, be deprived of their right to regulate the rates and charges of telegraph

and telephone companies for service performed wholly within the boundaries of such states. This is the view for which the defendant in error contends. This interpretation of the resolution is in no sense a forced construction. It is the natural and proper interpretation of this act when viewed from the standpoint of the circumstances surrounding its enactment or of the language in which it is expressed.

In the recent case of *Union Dry Goods Company* v. *Georgia Public Service Corporation*, reported in 39 Sup. Ct. Rep. 117, this court very plainly expressed its view that rate regulation by a state is an exercise of police power. The case was one in which the Dry Goods Company sought to restrain the public service corporation from collecting certain increased rates for electric light and power. The service corporation contended the rates which it proposed to charge had been authorized by the railroad commission of Georgia. The dry goods company proved that it had entered into a contract with the service company providing for the service at lower rates; and it contended that the advanced rates charged by the service company impaired the obligations of this contract, in violation of the Federal Constitution. In its opinion, this court said:

> "The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies *rate regulation by a state in the exercise of its police power*. *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Budd* v. *New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; *German Alliance Ins. Co.* v. *Lewis, Superintendent of Insurance of the State of Kansas*, 233 U. S. 389, 407, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189.
>
> "Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that *reasonable rates, fixed by a state in an appropriate exercise of its police power*, are invalid for the reason that if given effect they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the Railroad Commission."

The term "lawful police regulations" as it appears in the Joint Resolution has been construed in accordance with

the contention of the defendant in error in decisions rendered in the following, among other cases:

Public Service Commission of Indiana v. *Receivers of the Central Union Telephone Company*, decided in the Circuit Court in and for Marion County, Indiana, February 21, 1919.

State of Indiana v. *Indianapolis Telephone Company*, decided in the same court on the same day.

Commonwealth, ex rel., Attorney General, v. *The Bell Telephone Company of Pennsylvania*, decided in the Court of Common Pleas in and for Dauphin County, Pennsylvania, January 29, 1919. (See Appendix to this Brief).

People of the State of Illinois v. *Chicago Telephone Company, et al.*, decided in the superior court of Cook County Illinois. (See Appendix to this Brief).

State of Ohio v. *Ohio State Telephone Company*, decided in the Court of Common Pleas of Franklin County, Ohio, on January 25, 1919.

State of Mississippppi ex rel. Collins, Attorney General, v. *Cumberland Teleph. & Teleg. Co.* decided in the Supreme Court of Mississippi. (See Appendix to this Brief.)

It is true that the term "police regulations" is sometimes used in texts and opinions of courts in a limited sense, as applying only to regulations affecting public safety, public health and public morals. The same words are used, as the authorities referred to above and as many other authorities show, in the broader sense, including any and all regulations which the states make in the exercise of their police powers. A police regulation is an assertion or exercise of a police power; and under police powers the states may prescribe and enforce regulations which go beyond the preservation and protection of public safety, health and morals, and pertain to the general welfare and prosperity and to the control of persons and corporations engaged in conducting a business affected with a public interest.

Instead of the narrow construction of the words "lawful police regulations" for which defendants contend, and for which they must contend if their position is to be justified, we respectfully insist that a broad and liberal con-

struction should be made of these words and of the proviso in which they are contained, in order that the evident intention of Congress may prevail. The Joint Resolution, as a whole, is a grant of power by Congress to the President; the concluding proviso in the resolution is a limitation to that grant. It is usual that grants of power by legislation are strictly construed. Governments of enumerated and limited jurisdiction and officers, possessing only powers delegated by law, are, by the courts, invariably confined within the limits of the acts defining their powers and their jurisdiction. It is, therefore, under ordinary and well established rules of construction, very clearly the province of this court in construing the resolution in question, to interpret strictly that portion of the same which purports to grant powers and to construe liberally, with a view of effecting the purpose and intention of Congress, that part of the resolution contained in the proviso which limits the resolution as a whole.

Chesapeake & Potomac Tel. Co. v. *Manning*, 186 U. S. 238, 46 L. Ed. 1144.

It is not contended by the plaintiffs in error that the resolution contains any express grant of authority to the President to initiate rates for interestate or intrastate telephone communications, but it is contended, that inasmuch as the President was authorized to possess, control and operate telephone companies in such manner as he should deem needful or desirable, the inference necessarily follows that the President should control the rates to be charged. Considering the resolution as a whole it is plain that Congress intended the President to assume the position of a director and supervisor of the telephone properties, for operation during the war. By placing the operation of the different lines under a single management they become unified and coordinated. It was to be expected that a single control of all telephone lines would result in a more efficient and economical operation and in a more dependable and speedy service for the Government of the United States. It is reasonable to assume that Congress contemplated all of these results; but it is not reasonable to assume that by making the President the general supervisor of the telephone lines, Congress intended to confer upon him, except in the matter of facilitating Government communications, any greater rights in his relationship with the public than those

which the telephone companies themselves possessed. It is very evident, that the purpose of Congress was to place the Postmaster General in the shoes of the telephone companies in matter of rate making; that is, Power at page 583. Speaking there of the effect of police that he might increase interstate rates in the usual manner, and that he might procure increases of intrastate rates as the companies had always procured their increases, when they could justify the same. The necessity that the Postmaster General proceed as telephone companies had been theretofore required to proceed, with relation to their intrastate rates, could not possibly have interfered with the government operation, nor with any legitimate purpose of the Postmaster General. It has never, to our knowledge, been contended, and certainly is not contended in the record in this case, that the toll rates of the defendant telephone companies were inadequate when the Postmaster General assumed operation of their properties. It has never been contended, and certainly is not contended in this record, that if the defendants or the Postmaster General had required additional toll revenues for the operation of defendants in this state they or he could not have procured the same conveniently and speedily, if the same were warranted. We submit that Congress fully understood all of these considerations; and that its omission of any reference in the resolution to the rate making power was deliberate and intentional. Under such circumstances the courts ought not to read into the resolution a power which Congress did not attempt therein to confer upon the President. We cannot refrain from saying again that the circumstances under which the resolution was enacted, as well as the ends and aims sought to be accomplished, together with the circumstances arising since the Postmaster General assumed to operate the telephone properties, all combine in impelling us to the conclusion that Congress intended to preserve, and did preserve, to the states, their usual powers of intrastate rate regulation.

It is further contended by the plaintiffs in error that the term "police regulations" as used in the act is to be construed in the narrow sense in which those words are sometimes used and not in the sense of rate regulations as broad as police powers, for the reason that, although police powers of the states cannot be taken from them or delegated, never-

the less the rate making power can be delegated and that, therefore, rate making is not really an exercise of police powers. The decisions of the Supreme Court of the United States, and of many other courts, are squarely against this contention. Since the decision in *Munn* v. *Illinois*, *supra*, and in *Union Dry Goods Company* v. *Georgia Public Service Commission*, *supra*, there can be no doubt that rate making and rate regulation by states are attributable to police powers of the states. Plaintiffs in error illustrate their argument by calling attention to the fact that municipalities some times exercise rate making powers under authority of state laws. This is referred to as an example of the delegation of rate making power by states. A municipality is an agency of the state Government, and under well established authority, the state some times may delegate the exercise of its police powers to such municipality. However, the exercise of these powers by the municipality is always subject to the laws of the state and is always under the control of the state; and the delegation of these powers may be recalled from the municipality to the state government. On the other hand, the states have not delegated and could not delegate any such powers to the Federal Government, and if they did delegate them, could not recall them. In other words such a delegation as has ever been made by states of their rate making powers has not been in any sense a loss of control of the power delegated. Police powers that are exercised to preserve public peace, public health and public morals are likewise delegated to be exercised by municipal authorities, always under the control of and subject to recall by the state. We fail to see in the attempted distinction any difference in the nature of the police powers of the states when exercised to regulate the rates of common carriers, on the one hand, or when exercised to preserve peace, health and morals, on the other.

However that may be, of this we are certain, that it is wholly beside the question to argue that because municipalities exercise rate-making powers under authority of state laws, therefore, the Government of the United States may, with equal authority, regulate state rates, without the suggestion of any authority therefor delegated by the state. We respectfully suggest that the Federal government is not, and cannot be, fully cognizant of local needs and conditions; and that this case is an illustration of the impossibility of

action by the Federal Government with any regard for local conditions, because it is not even pretended in this case that the proposed rates were made to fit, or because demanded by, conditions within the state of South Dakota. Police powers are powers reserved to the states in recognition of the principle that local government can best be administered by local authorities. We believe that there is the same need of local rate regulation and supervision by local authorities when the business is carried on by the Federal Government as when carried on by telegraph or telephone companies whose properties extend over the entire nation.

This principle has been recognized by the Congress and by the Federal Courts when applied to railroads incorporated under Federal Law.

Smyth v. Ames, 169 U. S. 466.

Reagan v. *Mercantile Loan & Trust Co.*, 154 U. S. 413.

That the power to make and regulate rates of wire lines is a power which cannot inferred from any language used in the joint resolution, but must be positively conferred by unambiguous language, is a proposition which is abundantly supported by many authorities.

Reagan v. *The Mercantile Trust Company*, 154 U. S. 413, 38 L. Ed. 1028.

Omaha Street Railway Company v. *Interstate Commerce Commission*, 230 U. S. 324.

Interstate Commerce Commission v. *Louisville & Nashville Rr.*, 227 U. S. 88.

Georgia Railroad Company v. *Smith*, 128 U. S. 174, 182.

Interstate Commerce Commission v. *Railway Company*, 167 U. S. 479, 494.

Milwaukee Elevated Railroad Company v. *Wisconsin Railroad Commission*, 238 U. S. 174, 180, 49 L. Ed. 1254.

Home Telephone & Telegraph Company v. *Los Angeles*, 211 U. S. 265.

In *Reid* v. *People of the State of Colorado*, 187 U. S. 137, 47 L. Ed. 108, referred to in the opinion of the Supreme Court of South Dakota in this case, the court said:

"It should never be held that Congress intends to supersede or, by its legislation, suspend the exercise of the police powers of the states, even when it may do so,

unless its purpose to effect that result is clearly manifested."

Thus it seems to the defendant in error that if the joint resolution of July 16, 1918, is construed in the light of conditions existing and the settled principles of law at the time of its passage, or if it is construed with special reference to the purposes which it was intended to accomplish, or if construed by reference to the language contained in the resolution, the conclusion is unavoidable that what Congress intended to do, and succeeded in doing, was to reserve to the states their usual police powers to be exercised without impairment in any way for the regulation of the intrastate rates and fares of the telephone systems while under Federal control.

2. Congress was without power, under the Federal Constitution to delegate intrastate rate making power to the President or the Postmaster General, because such rate making is one of the inherent police powers of the states, and because the delegation of such power was not necessary and proper in carrying out any constitutional authority of Congress, the President or any Federal Officer. (1) Under the Commerce Clause, it is not possible for Congress or the President to interfere with state rate regulation except to remove unjust discrimination against interstate commerce; (2) Under the war powers, Congress or the President cannot exercise arbitrary power unrelated to war purposes; (3) Rate making is a legislative function which Congress was powerless to delegate to the President by means of the Joint Resolution of July 16, 1918.

The control by states of the rates of common carriers within their borders is attributable to one of the fundamental rights of the states, under our system of Federal Government. The purposes of the Tenth and others of the early amendments to the Constitution of the United States are so well understood, and the nature of the Federal Government as one of the enumerated powers is so well known that no discussion of these subjects is necessary in this connection; but these principles are controlling in this case because through their application in the decisions of our highest courts it has been established beyond question that the police powers of the states have never been conferred upon the Federal Government and have never been parted with

by the states; and that they remain under the exclusive jurisdiction of the states.

In *Cooley's Constitutional Limitations*, 7th Edition, page 831, it is stated that:

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual states, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. *Neither can the National Government, through any of its departments or offices, assume any supervision of the police regulations of the states.* All that the Federal authority can do is to see that the states do not, under cover of this power, invade the sphere of National sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the Nation, or deprive any citizen of rights guaranteed by the Federal Constitution."

The same principle is expressed as follows, in Volume 22 of the American and English Encyclopedia of Law, at page 919:

"The police power is inherent in the several states and is left with them under the Federal system of Government, and may always be exercised by the state legislatures. It follows that the Federal Government cannot exercise any police power within the several states, but it can exercise such power only where the authority of Congress excludes dominance of state legislation, as, for instance, in the District of Columbia where the police power of Congress is the same as that of the state legislatures within their several jurisdictions."

12 Corpus Juris, page 910.

2 Words and Phrases, page 1066.

Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

Civil Rights Cases, 109 U. S. 3.

Minnesota Rate Cases, 230 U. S. 352, 57 L. Ed. 1511.

In Volume 1 of *Roberts' Federal Liabilities of Carriers*, p. 36, it is stated that:

"The sole authority of the Federal Government during times of peace over common carriers within the states is contained in the commerce clause of the Constitution, which provides that Congress may regulate interstate and foreign commerce. The Federal Government may not,

therefore, regulate or control carriers engaged exclusively in intrastate commerce or even the intrastate business of interstate carriers; for all the attributes of a sovereignty not delegated to Congress by the commerce clause, have been retained by the states over common carriers operating within their borders, and they may exercise their power and control over all transportation exclusively within their boundaries to the same extent that the National Government exercises over transportation from one state to another and to foreign countries."

Congress Cannot Control Intrastate Rates Under the Commerce Clause

It appears to be the contention of the plaintiffs in error that the Postmaster General derived the power which he has attempted to exercise by means of Order No. 2495 to make intrastate rates, from the joint resolution of July 26, 1918, and also from the war powers vested by the Constitution of the United States in the President. We do not understand that it is contended that the resolution was passed in the exercise of the power of Congress to regulate interstate commerce, but if it is asserted that the commerce clause was authority for this resolution, a sufficient reply thereto is that the Supreme Court of the United States held in the *Minnesota Rate Cases*, 230 U. S. 352, and in the case of *Houston E. & W. T. R. Co.* v. *United States*, 234 U. S. 342, that under the commerce clause the United States Government cannot interfere with rates which are charged for service wholly within a state, except that in proper cases, and after sufficient investigation, the Interstate Commerce Commission may authorize common carriers to advance intrastate rates to the level of interstate rates in cases where this may be necessary, in order to remove unjust discrimination against interstate commerce. Except in this particular, the commerce clause does not authorize agencies of the National Government to control rates for intrastate transportation or service.

Congress, Under Its War Power, Cannot Control Intrastate Rates, Except When Necessary and Proper As a War Measure

If the joint resolution was passed by Congress in the exercise of the war powers of Congress, then as we shall presently show, it must appear affirmatively and not by in-

ference that it was necessary as a war measure to vest in the President authority to make intrastate rates for wire lines under Federal control.

It is asserted by the plaintiffs in error that under the war powers of Congress and the President, the Federal Government may exercise authority in derogation of the police powers of the states. It is urged with much emphasis in this case that the power which Congress exercised when it enacted the resolution of July 16, 1918, and the power which the President exercised through the Postmaster General when the latter issued Order No. 2495, on December 13, 1918, were the war powers of the legislative and executive branches of the Government.

Even if it should be granted for the purpose of argument that Congress, could, under Section 8, Article I, of the Constitution of the United States, vest in the President the authority to exercise police powers by regulating and controlling intrastate rates of telephone companies, still the language which Congress used in its resolution plainly indicates that Congress had no intention to grant any such power to the President; and that, on the other hand, by appropriate language it prohibited the President from in any wise amending, repealing, impairing or affecting the rights of the states to exercise their lawful police regulations, including the making of intrastate rates. But if the court shall be of the opinion that our construction of this language in the resolution is unwarranted, then the question of the power of Congress, under Section 8, Article I, of the Federal Constitution, to confer upon the President the right to make intrastate rates of telephone companies for service within the borders of the state of South Dakota, becomes a question of controlling importance.

There can be no doubt that the power of Congress, under the authority to declare war, to raise and support armies and to provide and maintain a navy, and to make all laws necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, is very broad, and must extend to any action of Congress which has any necessary or proper relation to the waging of war. Likewise the authority of the President as Commander in Chief of the army and navy, under Section 2, Article II, of the Constitution of the United States, is a

very extensive power and may be exercised by the President in any way necessary or proper to carry on war successfully It will be observed, however, that the language of the concluding paragraph of Section 8 of Article I of the Constitution, is that Congress shall have the power "to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

We contend that it is within the jurisdiction of the courts, and particularly of this court, to determine whether or not a law of Congress purporting to be necessary and proper for carrying into effect any provision of the Federal Constitution is, as a matter of fact, necessary and proper, and that the courts have jurisdiction to determine whether or not any part of the authority which Congress assumes to exercise under this provision of the Federal Constitution is necessary and proper for carrying into effect any of the powers vested in the Government of the United States. By analogy the conclusion cannot be avoided that the power and authority of the President of the United States, even as Commander in Chief of the army and navy, is not an unlimited power, and that anything which the President does upon the assumption that it lies within his power as Commander in Chief, or within powers conferred upon him by Congress, must be necessary and proper for carrying into effect powers vested in him by the Constitution. As in the case of enactments of Congress, so in the case of official acts of the President, it lies within the jurisdiction of the courts to determine whether the same are necessary and proper for carrying into execution any of his constitutional authority.

It is urged that the President is the sole judge of the necessity calling for the exercise of his war powers; and that his discretion is not reviewable by the courts. However, in a very early case, *Mitchell* v. *Harmony*, 13 Howard, 115, the Supreme Court of the United States said:

> "Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in the time of war. And the question here is whether the laws permit it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to take.

And we think it very clear that the law does not permit it."

In view of these considerations, the question arises whether or not the making of intrastate rates in South Dakota was necessary or proper to carry into effect any of the war powers vested in Congress or the President by the Federal Constitution. If such necessity existed, we submit that it does not appear in the present case, nor does it appear that the increases proposed in the telephone rates, arose out of war conditions, or that the increases in any way contributed to the National security of defense. The only possible necessity for increasing the revenues of telephone companies that does appear is the necessity for the raising of revenues to enable the Government of the United States to compensate the telephone companies for the use of their property. However, that is not a war purpose. Plainly, the concluding proviso in the resolution of July 16, 1918, indicates that in the opinion of Congress there existed no military necessity for increasing telephone toll rates.

Much emphasis is placed in argument of counsel for plaintiffs in error upon recitals contained in the proclamation of the President issued July 22, 1918, to the effect that, in his judgment, the assumption of Federal control and operation of wire lines was needful and desirable in the prosecution of the war. However, National operation and management of telephone lines and the making of intrastate rates for telephone companies are entirely different matters and in no wise necessarily related one to the other. The President did not proclaim that it was needful or desirable to increase intrastate telephone rates as a war measure. Neither did the Postmaster General, in Order No. 2495 recite that such increases in telephone rates were necessary, or that they contributed in any way to the successful prosecution of the war. (Tr. of Record, page 24).

However, if the president had declared, or if the Postmaster General had recited, that authority existed for increasing telephone rates in the manner proposed in Order No. 2495, such declaration or recital would not necessarily have determined the fact, and it would be the duty of the court in a proper proceeding to go behind such recitals, for otherwise it would be impossible to check the exercise of arbitrary power. Even if an administrative officer should act in entire good faith in declaring the possession of au-

thority which he did not possess, it would lie within the jurisdiction of the courts to enjoin him, if in fact he did not possess the authority claimed.

American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94.
Philadelphia Co. v. *Stimson*, 223 U. S. 605, 620.
Degge v. *Hitchcock*, 229 U. S. 162, 171.
United States v. *Lee*, 106 U. S. 196.

Therefore, if the President or Postmaster General had declared that the particular telephone toll rates involved in this case were necessary as a war measure, it would be the duty and within the jurisdiction of the court to review such a determination and determine whether as a matter of fact it was true. In this connection we wish to emphasize that we make a clear distinction between possession and operation of the telephone properties and the making of intrastate rates for the telephone properties. Possession and use thereof might be most necessary and desirable as a war measure, whereas the making of intrastate rates for the telephone service performed by means of such telephone properties would not have the remotest relation to any war purpose or war necessity. The relief sought in this case is not a judgment setting aside the Postmaster General's possession and operation of the properties of the telephone companies during the war, but is to restrain the telephone companies operating in South Dakota from changing and increasing established toll rates in that state in violation of the laws of the state, and without the semblence of any proof that the changes and increases proposed in the rates would contribute in the slightest degree to the success of the Government of the United States in the European war. The contention of the plaintiffs in error is that the President and the Postmaster General possess the power, because the President was authorized by the joint resolution of Congress to possess, control and operate the telephone lines during the war. They seek in vain in the resolution for any express grant of such power. They infer it, and ask the court by inference and construction to read such a power into the resolution and then contend that it should be called a war power.

If this court should be of the opinion that the language used in the joint resolution does not prohibit the President and the Postmaster General, as well as the telephone com-

panies operating in South Dakota, from interfering with or impairing the police reguations of that state, enforced in the form of regulations of intrastate toll rates, it will then be called upon to determine by what authority the President or the Postmaster General assumed to establish such intrastate rates. In times of peace it is established by all of the authorities that such power could not be conferred upon the President, except by Constitutional amendment. In time of war such powers could not be conferred upon the executive or one of his cabinet officers without justifying the same as a necessary exercise of war power. And we respectfully submit that the Postmaster General's Order No. 2495 does not contain upon its face or in any of the schedules or classifications of rates contained therein, anything whatever to indicate the necessity, desirability or propriety of the proposed rates as a means through which the interests of the United States in the war in Europe might be furthered.

Any Condition Making Intrastate Rate Control by the President, Necessary and Proper as a War Measure, Did Not Exist When Order 2495 Was Made, December 13, 1918

As a matter of fact it cannot, by any stretch of the imagination, be said that the proposed rates had any relation whatever to the war program of the Federal Government. The order in which these rates were promulgated was made on the 13th of December, 1918, 31 days after hostilities in Europe had ceased by the signing of the Armistice November 11, 1918. It is possible that, technically speaking, the war did not end on that date, but the conditions of the Armistice were such that the power of the enemy to resist further was ended and it was impossible thereafter for it to renew hostilities. On the day that the Armistice was signed, the President appeared officially before Congress to advise it as to the state of the Union, and then and there said:

"The war thus comes to an end; and having accepted these terms of Armistice it will be impossible for the German command to renew it."

In an official message delivered to Congress December 2, 1918, the President said:

"And now we are sure of the great triumph for which

every sacrifice was made. It has come, come in its completeness, and * * * we turn to the tasks of peace again, —a peace secure against the violence of irresponsible monarchs. * * * If the war had continued it would have been necessary to raise at least eight billion dollars by taxation, payable in the year 1919, *but the war has ended* and I agree with the Secretary of the Treasury that it will be safe to reduce the amount to six billions."

The Interstate Commerce Commission, which is a branch of the executive department of the Government of the United States, on January 20, 1919, in its decision in the case of *Pacific Lumber Company, et al.*, v. *Northwestern and Pacific Railroad Company*, 51 I. C. C. 738, said:

"We must notice that, as stated by the President to Congress, with the signing of the Armistice, the war thus comes to an end.

"We must notice that with suddenness and as of one accord the Nation has turned from the actual waging of war to the demobilization of military forces and the return of industries to their accustomed channels. No more than is necessary should war conditions be permitted to deprive any individual or locality of that equality of opportunity in respect to transportation which is insured alike by our fundamental economic policy and by the law."

It is, therefore, perfectly clear that if the President undertook to control telephones by virtue of the war powers of Federal Government, the fact is that the exercise thereof, which it is the object of this case to test, was not undertaken until a time had arrived when the highest authorities of the Federal Government itself acknowledged that the war had ended. These considerations have no bearing on the construction to be made of the joint resolution of Congress, but they have an important bearing upon the contention of the defendants in this case that the Postmaster General's Order No. 2495, dated December 13, 1918, effective January 21, 1919, has any warrant as a war measure.

On April 3, 1919, United States District Judge Walter Evans, in the District Court of the United States for the western district of Kentucky, decided the case of *United States v. Harry Hicks*. That was a case in which the defendant had been convicted of violating Section 13 of the Act of May 18, 1917. The defendant thereupon moved for a

new trial, and that judgment on the verdict be arrested, upon the ground that the facts proved did not show that any offense had been committed against any law of the United States. It became necessary for the court to determine whether or not Section 13 of the Act approved May 18, 1917, was in effect on the 7th day of December, 1918, when it was charged in the indictment that the crime had been committed at a place within five miles of the boundary line of Camp Zackary Taylor. The act contained the provision that:

> "The Secretary of War is hereby authorized, empowered and directed *during the present war* to do everything by him deemed necessary to suppress and prevent," certain acts named in the section "within such distance as he may deem needful of any military camp, station, fort, etc."

The court quoted from the President's address of November 11, 1918, and in a very able and exhaustive opinion came to the conclusion which it expressed as follows:

> "We know the war began on April 6, 1917. When did it end? On November 11th, as we have stated, the President communicated to Congress the express information that this 'tragic war * * * is at an end.' This status then ascertained and communicated to the Congress by the chief of the executive end of the military service of the United States Government should, we think, be accepted as accurate and final by the court in this case."

The court then concluded that the Act of May 18, 1917, which made criminal certain immoral conduct if committed "during the present war" was not effective on the 7th of December, 1918, because the war had then been officially proclaimed to be at an end.

This principle is of first importance in the instant case, because it shows that even if it should be conceded that Congress might authorize the President to change and increase South Dakota intrastate rates under the war powers of Congress and the President, still no attempt was made to exercise such power during the war or pursuant to any war purpose or in accordance with any plan for prosecuting the war. The Postmaster General did not promulgate his order until after all necessity for the regulation of such rates as a war measure had passed. It cannot be said,

therefore, that in promulgating the proposed toll rates on December 13, 1918, or in attempting to put them into effect in South Dakota, on January 21, 1919, the President or Postmaster General, or the toll lines in South Dakota, were exercising any power bearing any relationship whatever to war power.

Congress Cannot Confer Legislative Power Upon the President, to Make Rates for the Future

In many cases it has been decided that the making of rates for the future is a legislative function. It is one of the fundamental principles of Constitutional law in this country that Congress cannot delegate legislative powers to the executive department. Plaintiffs in error contend in this case that it is within the discretion of the President to determine what rates should be charged for transmitting toll messages between points within the several states. Clearly they are contending thereby that the President, either by virtue of the commerce clause or the war powers of the National Government, is authorized to exercise a purely legislative function. The joint resolution, unlike the Federal Control Act of March 21, 1918, applying to railroads, does not expressly authorize the President to initiate rates, does not provide that rates so initiated must be reasonable and does not provide, as does the Federal Control Act, for the review of any rates which the President may make either by the Interstate Commerce Commission or by the Courts. If the President has any authority whatever by virtue of the joint resolution to make rates he makes them as the plaintiffs in error contend here, *in the exercise of his discretion.*

It was pointed out in the case of *Field* v. *Clark*, 143 U. S. 649, that Congress cannot delegate legislative power. In its opinion, at pages 692 and 693, the Court said:

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of Government ordained by the Constitution. * * * Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. * * * He had no discretion in the premises, except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy estab-

lished by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the leglislative will, he exercised the function of making laws."

In this opinion the court pointed out this vital distinction:

"'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.'"

3. The Supreme Court of South Dakota had jurisdiction. The suit is not one against the United States, the President or the Postmaster General; and its purpose was not to control revenue or property of the United States. The defendants are wrongdoers, and cannot defend upon the ground that they acted under orders which the President or Postmaster General was without authority to issue.

Supreme Court of South Dakota Had Original Jurisdiction

This suit was instituted as an original action in the Supreme Court of the State of South Dakota, in the name of the state on the relation of the Attorney General, and its object was to prevent, by a writ of injunction, a threatened violation of its laws. The defendants were, under the definition of the state laws, common carriers operating under franchises granted by the state, and were threatening, under the alleged authority of Federal Government, to invade rights which the state believed that it possessed as one of the sovereign states of the Union. That the state had the right to proceed in this manner in the highest court of the state has been many times upheld by the courts.

Attorney General v. Ry. Co., 35 Wis. 425.
State of Wis. ex rel., Bollens v. *Frear, et al.*, 231 U. S. 616.
State v. Chicago, etc., R. Co., 88 Neb. 669.
Everett v. *Board of Commissioners*, 1 S. D. 365, 47 N. W. 296.

In the case of *State of Wisconsin, ex rel., Bollens*, v. *Frear, supra*, the Supreme Court of Wisconsin in an opinion by Judge Winslow, quoted with approval from the

opinion of Justice Smith in the case of *Attorney General* v. *Blossom*, 1 Wis. 317, as follows:

> "And, why was original jurisdiction given to the Supreme Court, of these prerogative writs? Because these are the very armour of sovereignty. Because they are designed for the very purpose of protecting the sovereignty and its ordained officers from invasion or intrusion, and also to nerve its arm to protect its citizens in their liberties, and to guard its prerogatives and franchises again usurpation. * * * To preserve the liberties of the people, and to secure the rights of the citizens, the state must have means of protecting itself.'" * * *

Continuing his very interesting and able opinion in *State* v. *Frear, supra*, Judge Winslow, at the conclusion of his examination of former decisions of the court upon the same question, said:

> "The affirmative result of the significant cases since the Railroad Cases is, as it seems to us, that the original jurisdiction of this court may be rightly invoked when there is a showing made * * * that * * * (4) a law regulating public service corporations in the interest of the people is systematically disobeyed and set at naught."

It is contended by the plaintiffs in error that this is in effect a suit against the United States and that it cannot be maintained because the United States has not consented to be sued; that the suit attempts to bring into review a discretionary act of the executive department which is not reviewable by the courts; and that, for these reasons, the Supreme Court of South Dakota was without jurisdiction over the controversy.

This is Not a Suit Against Any Officer of the United States

It is the contention of the defendants in error that this is not a suit against the United States or one of its officers, and is not a suit against the property of the United States. This contention is based upon the proposition heretofore discussed that the joint resolution of Congress prohibits the President and the Postmaster General from interfering with the right of the state of South Dakota to regulate purely intrastate toll rates of the plaintiffs in error. If we are right in this contention then it follows that the telephone companies, Postmaster General and the President are mere trespassers and wrongdoers and that they are not

protected by any provision of the joint resolution in the unauthorized action which they proposed to take. If in the increasing and changing of the established South Dakota toll rates, the telephone companies, Postmaster General and the President acted wholly outside of their power, they were not engaged in performing any official act. In this view of the case an injunction interfering with them when so acting would not be an interference with the President as an official, or with any official action and, therefore, would not be against the Federal Government. Where the authority to do the act complained of is challenged, it cannot be said that the suit is against the United States.

Philadelphia Co. v. *Stimson*, 223 U. S. 605.
U. S. v. *Lee*, 106 U. S. 196.
Cunningham v. *Macon & Brunswick Rr.*, 109 U. S. 446, 452.
Tindal vs. Wesley, 167 U. S. 204.

This is Not a Suit Against the United States, Its Property, or Its Revenues

It is contended that this is a suit against the United States because it is a suit involving the property of the United States. It is urged that all property which formerly belonged to the telephone companies is now the property of the United States; and that the purpose of this action is to control the Government of the United States in its use and possession of the same. It is also urged that the necessary result of this suit is to interfere with the revenues to be received upon the proposed rates, which would be property of the United States.

These contentions are invalid under our theory of the case. Certainly it cannot be said that revenues to be received from rates which the telephone companies or the Postmaster General are unauthorized to make would be revenues or property of the United States. For the same reason this is not a suit to control property of the United States, when used in any lawful or authorized manner. It is a suit merely to control an unlawful, unauthorized and arbitrary proposed use of property. It is not legal use of the telephone property which is sought to be controlled by this action, but it is the proposed unlawful acts of the telephone companies that the defendant in error asks to enjoin. The United States was not made a party defendant because its property is not the subject of the suit, and no lawful order or

regulation of the United States or of any of its officers is involved. The only purpose of this suit was to restrain unauthorized and unwarranted acts threatened by the defendant telephone companies in violation of the laws of South Dakota. This is distinctly not a suit *in rem* but it is a suit *in personam* and the defendant telephone companies who proposed actually to take money from telephone users in South Dakota unlawfully were and are the only necessary parties defendant.

4. It is within the power of the court to determine the limits of executive authority, and to restrain acts in excess thereof. Assertion of authority by an officer attempting to exercise it does not preclude the courts' jurisdiction to determine its existence. This suit is not one to control administrative discretion, but to restrain acts in threatened violation of law and in excess of legal authority.

Courts Will Restrain Unauthorized and Unlawful Acts of the Officers and Agents of the Federal Government

Upon the authority of the decisions of the Supreme Court of the *United States in United States* v. *Lee, supra*, and in *Cunningham* v. *Macon & Brunswick Railroad, supra*, it cannot be doubted that it is the duty and within the jurisdiction of the courts, regardless of any assertion of authority by the President or the Postmaster General, and regardless of any reliance by the telephone companies upon any such an assertion of authority, to determine and adjudicate the fact as to whether or not the President or the Postmaster General possessed the authority claimed. These cases are equally controlling, regardless of the nature of the authority which an officer of the Government may maintain that he possesses. It is necessary that in exercising war powers the executive shall be confined within the limits of his authority and the courts will determine the question as to whether his acts are within such authority. In the early case of *Ex Parte Milligen*, 4 Wall 2, 120, 121, the Supreme Court of the United States said:

> "The Constitution of the United States is a law for rulers of people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be

suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or depotism. But the theory of necessity upon which it is based is false; for the Government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence."

This is not a case in which it is sought to control the discretion of the President or of the Postmaster General. It is not here contended that either of them exercised in an improper manner any authority which he possessed. On the other hand, it is here contended that the telephone companies in their answers purport to rely upon acts of the Postmaster General of the United States performed wholly without any authority. The courts could not in any wise control the discretion of an executive officer acting within his conceded authority, but when an executive officer acts arbitrarily in excess of his authority then it is for the courts, and for the courts alone, to restrain such unauthorized action; and a suit brought for that purpose is not a suit against the United States or the state and is not a suit to control property of the United States or of a state, regardless of the fact that the person assuming to exercise authority which he does not possess may be an officer in the executive department of the United States or a state.

Hopkins v. Clemson College, 221 U. S. 626, 643, 644.

Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620.

The contention of the defendants is that the United States is the real party defendant in interest. That would be true if this suit related to the exercise by the Federal government of any authority which it has a right to exercise. Our contentions in this case rest mainly upon the proposition that the joint resolution of Congress preserved to the state of South Dakota the regulation of intrastate telephone toll rates. If this is true, the government of the United States, the Postmaster General or any agents of the Postmaster General, have no power to prescribe such rates. If under such circumstances the defendant telephone companies attempt to collect unauthorized charges for their intrastate toll messages they may be enjoined in an action which does not name the United States as a party, because the United States can have no interest in a matter wholly

beyond its jurisdiction or control. It is true that courts cannot control the discretion of officers of the United States or of a state. Courts can control the ministerial acts of such officers; but this case rests upon a different proposition. The acts of the telephone companies sought to be enjoined are not acts of the Federal government, because beyond its powers. It is not sought in this case to control the President's discretion, because it relates to a matter wholly beyond his jurisdiction. The defendant telephone companies are threatening to do an act which, if our construction of the law is correct, is unlawful, and they may be restrained from doing so.

Nobel v. *Railroad Company,* 147 U. S. 165, 13 Sup. Ct. Rep. 271.

Caldwell v. *Robinson,* 59 Fed. 653.

American School of M. H. v. *McAnnulty,* 187 U. S. 94.

Louisiana Board of Liquidation v. *McComb,* 92 U. S. 531, 541.

Conclusion

It seems clear that the defense in this case when considered upon any of the grounds that have been urged must fail. We believe that upon its consideration of the case this Court must conclude that the following propositions have been established: (1) That Congress did not intend to confer upon the President the power to make intrastate rates for telephone companies; but that on the other hand, it expressly reserved to the states in the exercise of their lawful police regulations, the right which they had always possessed theretofore to regulate such intrastate rates; (2) That Congress was without power, under the Constitution of the United States, to delegate intrastate rate making power to the President or to the Postmaster General; and that if Congress attempted so to do, pursuant to its war powers, it did not succeed, because the making of intrastate rates for telephone companies is a matter wholly unrelated to war purposes, and is in no sense a war measure; (3) That this is not a suit against the United States or the President, or any other officer of the United States; that its purpose is not to control revenue or property of the United States; that the defendants are wongdoers who cannot defend upon the ground that they have acted under orders

which the President or the Postmaster General made wholly in excess of authority; and that, therefore, the suit is one of which the Supreme Court of South Dakota had original jurisdiction; and (4) that the judicial power of the courts extends to the controversy, because it is not one in which it is sought to control administrative discretion, but to restrain acts in threatened violation of law in excess of legal authority.

The decree of the Supreme Court of South Dakota should accordingly be affirmed.

Respectfully submitted,

BYRON S. PAYNE,
Attorney General,
OLIVER E. SWEET,
Assistant Attorney General,
Solicitors for Defendants in Error.
Pierre, South Dakota.

April 30, 1919.

APPENDIX

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNA.

Sitting in Equity.

Equity Docket No. 631.

Commonwealth Docket, 1919, No. 1.

Commonwealth of Pennsylvania, Ex. Rel., William I. Schaffer, Attorney General, *Plaintiff*,
vs.
The Bell Telephone Company, of Pensylvania, *Defendant*.

Equity-Injunction-Motion to continue same—Rates-Increase of without approval of Commission—Federal control—Police power of State—Constitutional provisions—Jurisdiction of Court.

The joint resolution of Congress authorizing Federal control and operation of telephone and telegraph lines for the duration of the war, provides that nothing in the Act, be construed to impair the police power of the several states. An increase of rates without the approval of the Public Service Commission is an unwarranted interference with the police power of the State in violation of the above named provision.

The President as Commander-in-Chief of the army or navy may seize and control the property of the defendant company for use in prosecution of the war, but the rates and tolls charged others for uses of the lines while under Federal control have no real relation to Federal use for war purposes. Hence, an attempt to increase the rates without the consent of the Commission is not an official act, and the representatives of the President are subject to the control of the court in such matters.

Injunction continued until final hearing.

APPEARANCES:

Bernard J. Myers, Deputy Attorney General, Commonwealth of Pennsylvania,
William I. Schaffer, Attorney General, Commonwealth of Pennsylvania.

Representing the Plaintiff.

J. L. Swayze,
Thomas Patterson,

Representing the Defendant.

Rogers L. Burnett, United States Attorney for the Middle District of Pennsylvania,

Representing the United States of America.

KUNKLE, P. J., April 2, 1919:

The attorney general has filed this bill in behalf of the Commonwealth and seeks thereby to restrain the defendant company from charging rates for the use of its lines within the State different from those approved by the Commonwealth's Public Service Commission. A preliminary injunction was granted and the case is now before us on a motion to continue the same. The defendant has filed its answer in which it denies that it has any control over its lines or is now operating them, except under the direction and orders of the Postmaster General who has taken possession of and is operating them, and that the changed rates and toll charges are being enforced by him. It disclaims any responsibility for the operation of its lines under the new and unapproved rates. The jurisdiction of the Court also is questioned in a plea filed by the United States Attorney.

The Postmaster General in taking and assuming the control of the defendant's lines and in operating its systems, acted under the proclamation of the President of the United States issued July 22, 1918, to the effect directing that the supervision, possession, control and operation of telephone systems shall be exercised by and through the Postmaster General, said "Postmaster General may enforce the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as he shall determine through the owners, managers, Board of Directors, receivers, officers and employees of said telegraph and telephone systems." Acting under authority thus conferred, the

Postmaster General by an order known as No. 2495 issued December 12, 1918, directed that the rates for toll service over the deefndant's telephone lines should be charged and computed according to a standard schedule set forth in the order, which rates were not approved by the Commonwealth's Public Service Commission as required by the Public Service Company Law (P. L. 1913, p. 1374) and were different from those approved and theretofore in force. The President's proclamation was issued pursuant to a joint resolution of Congress, approved July 16, 1918, which provides that: "the President during the continuance of the present war is authorized and empowered whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control of any telegraph, telephone, marine, cable or radio system or systems or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control or operation shall not extend beyond the date of the proclamation by the President of the exchange of the ratification of the treaty of peace. Provision is also made in the resolution for the payment of compensation to the persons affected for the use and operation of the systems. The resolution further provides that nothing in this act shall be construed to amend, repeal, impair or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations of the several states, may effect the transmission of Government communication or the issue of stock or bonds by such system or systems." Thus it appears the President is authorized when he shall deem it necessary for the national security or defense, to take under his control and operate in such manner as may be deemed needful or desirable, for the duration of the war, the defendant's telephone system; and the duration of the war is practically defined to extend to the date when the President shall proclaim the exchange of the ratification of the treaty of peace. The time when he shall exercise his authority and the manner of its exercise is committed to his judgment and discretion. However, the period during which he may exercise his authority is limited and he may not in exercising it, impair or affect the lawful police regulations of the States.

The action of the President in taking possession, as-

suming control and supervision of telegraph and telephone systems within the jurisdiction of the United States is stated to be not only under and by virtue of the power vested in him by the Federal resolution but by all other powers thereto him enabling. The Commonwealth contends that the powers thus conferred may not be exercised at the present time because the war during which they were to be exercised is at an end; that the resolution did not contemplate a change of defendant's rates and tolls by the President when authority was granted him to operate its lines; that the resolution of Congress has been misconstrued, as it specifically provides against the impairment or change of existing laws of the States in relation to taxation or the lawful police regulation of the several states, and that the required approval of the defendant company's rates by the Public Service Commission is one of the Commonwealth's police regulations. The defendant takes issue on these propositions and insists that the President's power to do the act complained of arises not only out of the resolution of Congress referred to, but also inheres in his office as Commander-in-Chief of the army and navy, which no Act of Congress can constitutionally limit. It further objects to the proceeding as being one in effect against the United States which has not consented thereto. The controversy is therefore over the power of the President and Postmaster General to change the rates from those approved by the Public Service Commission of the Commonwealth and in force prior to and at the time the defendant company was taken into their control and operated by them; and also over the jurisdiction of the Courts to interfere with them in so doing.

As has been said, it is averred and not denied that the officers of the company are not operating it or attempting to enforce the new rates and tolls, but it is contended on the part of the Commonwealth, that although not acting of their own motion but merely as a means and instrumentality, they are acting at the behest of the Postmaster General representing the President, and are thus assisting and abetting him in enforcing the changed tolls and to that extent they should be enjoined.

We have stated that the defendant company and the United States District Attorney also assert that the Postmaster General's power to change the rates which were

theretofore adopted by the company and approved by the Commonwealth's Public Service Commission as required by law, is found in that provision of the Constitution of the United States, which makes the President thereof the Commander-in-Chief of the army and navy.

Under the provisions of the Constitution there can be no question that the President of the United States is empowered as Commander-in-Chief of the army and navy to direct the movement of troops and to plan the campaign and to do everything necessary for the prosecution of war. It may be conceded for the purposes of this case, that he and the Postmaster General acting for him, have the power to take over and use the property and lines of the defendant company in the proper conduct of the war; to use them for governmental communications in connection with the prosecution of the war and to prevent or allow their use by others. The question, however, remains whether they are empowered to use and operate the defendant's telephone system for any other purpose than such as the necessity of the occasion actually demands. It is self-evident that he may use it for all war purposes without changing the rates which the Commonwealth's Public Service Commission approved, because in the conduct of the war and in the exercise of his power as Commander-in-Chief of the army and navy, the rates and tolls chargeable to the public would be of no moment to him, inasmuch as he may use the defendant's lines and property by virtue of such power and under the necessity of the circumstances to the exclusion of the public. The rates and tolls charged others whom he may permit to use the lines while under his control would seem to have no real relation whatsoever, to his use of the system for all proper war purposes. Hence it would appear that his attempt to change the rates and enforce rates which were not approved by the state authorities is wholly outside of his power. If this be true, in so doing he is not engaged in an official act but in acting beyond his power. In this view of the case an injunction interfering with him from so acting would not amount to an interefernece with him as an official or with his official action and therefore would not be against the Federal Government. Where the authority to do the act complained of is challenged the suit is not against the United States. *Phil. Company* v. *Stimson*, 223 U. S. 605, *United States* v. *Lee*, 106 U. S. 196. If he be

acting outside of his power he ought not to be permitted to seek refuge behind the office which he occupies and is administering.

But it is urged that the President is the sole judge of the necessity calling for the exercise of his war power and that his discretion is not reviewable by the courts. This proposition seems to be settled to the contrary in *Mitchell* v. *Harmony*, 13 Howard, 115; *Little* v. *Barreme*, 2 Cranch, 170. In the former case it was said: "our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it." If this be so as to the taking of property, it must be equally so as to its use thereafter. However, be that as it may, we do not understand the law to be when the President has taken property under imperative and imminent necessity that he is the sole judge of the purposes for which he may use it. Whether he is using it for war purposes is a judicial question and depends upon the facts and circumstances of the particular case. When he attempts to use the defendant's lines and it does not appear that it is for a war purpose, but on the contrary appears to be for a purporse having no apparent or direct relation to the prosecution of the war, it must be shown we take it, that he is using it for a lawful and constitutional end. The necessity out of which his power arises does not appear in the present case. The fact that the necessity actually existed for changing the rates and charges and arose out of war conditions and that the change was in the interests of the national security and defense, does not appear. On the contrary, no necessity appears unless it be that of raising revenue to help the Federal Government compensate the defendant company for the use of its property. That is not a war purpose. The proviso to the Congressional resolution shows that in the opinion of Congress there existed no military necessity for changing the rates.

It may be conceded that the courts have no power to review the President's official discretion in operating the company for war purposes, but a different question is presented when it is claimed that in changing the rates and

attempting to enforce the unapproved rates, he is acting beyond his powers. The question whether the power which he is exercising belongs to him is a question of fact determinable from the admitted purposes for which he is exercising it. It would hardly be contended that if he took possession of private property under what is called his war powers and used it for other than war purposes he was acting within his constitutional powers. To illustrate, if he took possession, under his war powers, of a citizen's residence and used it by renting it to another for the purpose of revenue, could he justify the act under his war power? Surely he could not divert the property taken, from a war use to some other use. It would seem therefore that if he attempts to use the defendant's telephone system for a purpose which has no relation to the national defense or security and if he may not, as President, because of his office, be subjected to injunction or to the process of the courts for so doing, still there is no reason why those who assist him and are within the jurisdiction of the courts, should not be prevented so far as they are amendable to judicial process.

We recognize the fact that there may be many cases involving the exercise of the President's war power where a Court of Equity would refuse to interfere because more harm than good might be done by interference, but we do not think that the present case is one of them. As we have already observed, the use by the public of the defendant's system and lines does not appear to have anything to do with the war or the national secuirty or defense, and this is true, consequently, with respect to the rates chargeable for such use. They are wholly aside from the purpose for which the system was subject to be taken under government control and operation; and the system may be operated for such purpose independently of the rates chargeable to the public.

It may be suggested that it is the duty of the President while in control of the defendant's lines to so operate them as to result in the least loss to its business. This may be true, but would hardly justify the change of the rates chargeable to others for the use of the lines when, in the absence of any proof on the subject, the rates fixed by the Public Service Commission, whose duty it is to pass on the question, must be presumed to be fair, reasonable and adequate between the company and its patrons. If they

were not, there is no doubt on applying to it the Commission would have afforded ample relief.

It is also asserted that the President of the United States and his Postmaster General were warranted in changing the rates approved by the State authorities by the Federal Resolution which authorized the taking over, possession, control and operation of the defendant company's system of lines. It is important, therefore, to examine into the Federal resolution and to ascertain whether it will bear the construction which they have put upon it. The very resolution to which they appeal for justification of their act expressly provides that in acting under it, the State's police regulations shall not be impaired. Here is an express prohibition against interference with the rates of the defendant company; for it cannot be successfully disputed that the regulation of rates by State law is a police regulation. The suggestion that the police regulation referred to in the proviso mean police regulations other than those relating to rates and tolls is not tenable. To so hold would be practically to nullify the proviso. We cannot understand a construction which would hold the reference to be to that which is remotely rather than to that which is closely allied to the subject of the legislation. What we have said with respect to the relation of the rates and tolls chargeable by the company to the use of the lines for war purposes and for the national security and defense, under the Presidential power is applicable also to the use of the lines under the Federal resolution, even if no effect be given to the proviso. It is quite clear that the resolution did not contemplate an interference with the rates and tolls in force at the time it was passed. If it had made no declaration on the subject we would not assume that it intended to authorize the operation of the lines for purposes other than war purposes or contrary to the laws of the state. Here too then it is evident that the President and his Postmaster General are acting beyond any power conferred upon them by the Federal resolution. It is no answer then to say that they were engaged in an official act, representing the government of the United States when they changed the rates and tolls chargeable for the use of the lines within the State by others, and may not therefore be interfered with or obstructed without the Government's consent.

It appears therefore that the change of the rates chargeable to the public has no effective relation to the use of the defendant's system for war purposes or the purposes for which it was authorized to be taken over by the Federal authorities, either under the power of the President, as Commander-in-Chief, or under the Federal resolution.

The conclusion follows that neither the President nor the Postmaster General was acting officially in changing the rates and tolls, but they acted beyond the scope of their powers. In such case they are open to interference and prevention so far as lies in the power of the State Courts, especially in the present case where their act amounts to a disregard of the Commonwealth's laws and is an attempt to do that which the defendant company itself could not lawfully do.

It will hardly be questioned that the Commonwealth of Pennsylvania has the power to enforce its own statutes, and to prevent their violation; or that this Court has local jurisdiction to entertain the present bill for the purpose of preventing the violation of the order of the Public Service Commission. This right seems to be clear, Sect. 34, Act of July 26, 1913, P. L. 1429, *Com.* vs. *Order of Solon*, 166 Pa. 38; and we think anyone who undertakes to disobey the order should show such a state of facts as plainly justifies his action.

For the considerations stated which we feel are developed only in part, we are induced to continue this injunction until final hearing, when the facts of the case may be fully shown and the questions which have been raised may be more thoroughly discussed and considered.

Accordingly the motion to continue is sustained.

I fully concur in the foregoing opinion and conclusion. Sam'l J. M. McCarrell, J.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Ex rel Ross A. Collins, Attorney General,
vs.
Cumberland Telephone and Telegraph Company,

In Banc.—SMITH, C. J.

The contentions of the appellees are, first, that the court below without jurisdiction for the reason that this is in effect either a suit against the United States, or an attempt to control the discretion of the President in the exercise by him of an executive function;

2nd, that the United States is not within the statutes of this state providing for the supervision of telegraph and telephone systems for two reasons, (a), it was not engaged in operating such systems when these statutes were enacted, and (b) is not specifically referred to therein;

3rd, that the right of the several states to regulate intrastate telegraph and telephone rates is not preserved by the provision of the resolution of the Congress adopted on July 16, 1918, authorizing the President to take possession of and operate the telegraph and telephone systems of the country, "That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the state in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of Government communications or the issue of stock and bonds by such system or systems";

4th, that the President is vested by the Constitution, because of his designation therein as commander in chief of the army with the power to take possession of and operate the telegraph and telephone systems of the country for military purposes, and as an incident thereto to permit their use for private purposes on such terms as he may prescribe, which power the resolution adopted by the Congress on July 16, 1918, did not add to and cannot be held to.

Taking these contentions up in their reverse order, we are of the opinion that:

1st. The Congress has the power to define the powers to be exercised by the President as Commander-in-Chief of the army, and to prescribe the mode in which they should

be exercised; but if mistaken in this, that the power to operate a telegraph or telephone system as a public utility without the zone of military exportations is not one of the powers which can be said to be necessarily appurtenant to the office of the Commander-in-Chief of the army, and can be rightfully exercised by him only when he has been authorized so to do by the Congress. *McLaughlin* v. *Green*, 50 Miss. 453; *ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281.

2nd. By adopting the proviso to the resolution here in question, and under which the President must operate, if at all, the telegraph and telephone systems of the country as public utilities, it was the intention of the Congress to cause the control of the several states over the operation of the telegraph and telephone systems within their borders, to be interferred with only to the extent necessary to safeguard the transmission by the Government of its own messages, and the issuance of the stock and bond of such telegraph and telephone systems as might be taken charge of by the President, and "the lawful police regulation" therein referred to, are not limited to such only as promote the public health, morals, or safety, but extend also to such as promote the public convenience, or the general welfare within which is embraced a regulation fixing the tolls to be charged for intrastate messages. *License Cases*, 5 How. 504, 12 L.Ed. 255; *Stone* v. *Y. & M. V. R. R.*, 62 Miss. 607; *Stone* v. *Farmers Loan & Trust Co.*, 116 U. S. 307, 29 L. Ed. 636; *Lake Shore, etc., R. R.* v. *State of Ohio*, 173 U. S. 285, 43 L. Ed. 702; *Chicago, etc., R. R.* v. *State of Illinois*, 200 U. S. 561, 50 L. Ed. 596; *Mutual Loan Co.* v. *Martell*, 222 U. S. 56 L. Ed. 175; *C. & A. Railroad* v. *Tranbarger*, 236 U. S. 65, 59 L. Ed. 1204.

3rd. That the United States was not engaged in operating telegraph and telephone systems when the statutes of this state providing for the supervision of such systems were enacted, and is not specifically referred to therein, does not relieve such systems from the effect of these statutes because they have been taken over by the President for the rason that the resolution adopted by the Congress here in question provides that they shall remain subject to the existing police regulations of the several states.

4th. The injunction here is not against the President in person but against a subordinate officer who seeks to justify his contemplated action by the claim of power dele-

gated to him by the President. This claim does not of itself oust the Court of jurisdiction, but must be established by the apellees, and this they cannot do for the reason that the President has not been vested by the resolution of the Congress here in question with any power to disregard the police regulations of the several states, nor to authorize any subordinate so to do, but on the contrary the resolution expressly enjoins them to observe them, from which it necessarily follows to a subordinate.

5th. The object sought to be accomplished by means of the injunction here in question is neither the destruction of property rightfully in the possession of the United States, nor to forbid the use or disposition thereof by its agent nor to compel its agent to do or refrain from doing something which it has contracted to do, and thereby, in effect, compel the Government in the one case to perform, and in the other to break its contract, but is simply to restrain a public officer from acting in excess of his authority, so that the case is not ruled by that line of cases exemplified by *Hageed* v. *Southern*, 117 U. S. 52, 29 L. Ed. 805; *Belknap* v. *Schild*, 161 U. S., 40 L. Ed. 599; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 46 L. Ed. 954; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 48 L. Ed. 1134; *Oregon* v. *Hitchcock*, 202 U. S., 60 L. Ed. 935; *Naganab* v. *Hitchcock*, 202 U. S. 473, 50 L. Ed. 1113; *Louisiana* v. *McAdoo*, 234 U. S. 627, 58 L. Ed. 1506, and *Wells* v. *Roper*, 246 U. S. 335, 62 L. Ed. 755; but is ruled by that line of cases exemplified by *Osborn* v. *Bank of United States*, Wheat 9, 738, 6 L. Ed. 204; *Board of Liquidation, etc.*, v. *McComb*, 92 U. S. 531, 23 L. Ed. 623; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. Ed. 363; *Nobles* v. *Union River Logging Railroad*, 147 U. S. 165, 37 L. Ed. 123; *Scott* v. *Donald*, 165 U. S. 107, 41 L. Ed. 468; *Smyth* v. *Ames*, U. S. 466, 42 L Ed. 819; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 47 L. Ed. 90; *ex Parte Young*, 209 U. S. 123, 52 L. Ed. 714; *Ludwig* v. *W. U. Tel. Co.*, 216 U. S. 146, 54 L Ed. 423, and *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 56 L. Ed. 570, and the fact that the money which the appellees are sought to be enjoined from collecting will be turned over by them, if collected, to the United States, or will be expended by them for its benefit does not make it a necessary party to the suit. *U. S.* v. *Peters*, 5 Cranch. 115, 3 L. Ed. 53; *Osborn* v. *Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Poindexter* v. *Greenhow*,

114 U. S. 270, 29 L. Ed. 187; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. Ed. 363; *ex parte Tyler*, 49 U. S. 164, 37 L. Ed. 689; *Scott* v. *Donald*, 165 U. S. 58 41 L. Ed. 632.

The appellants did not ask the court below to interfere with the official discretion of the Postmaster General but in the language of Judge Hughes in *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 56 L. Ed. 570, "challenged his authority to do the thing of which complaint is made. The suit rests upon the abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

The decree of the court below will be reversed and a decree will be rendered here reinstating the injunction prayed for and making it perpetual.

Reversed and decreed here.

Stevens, J., dissents.

State of Illinois, }
County of Cook, } ss.

In The

SUPERIOR COURT OF COOK COUNTY.

People of the State of Illinois, *Complainants,*

vs.

Chicago Telephone Company, Bernard E. Sunny, W. R. Abbott, American Telephone & Telegraph Company, Theodore N. Vail and David F. Hall, *Defendants,* } In Chancery. No. 341126.

Hon. CHARLES M. FOELL, Chancellor.

This is an action by the People of the State of Illinois instituted by the Attorney General by direction of the Public Utilities Commission, under section 75 of the Act of the General Assembly of the State of Illinois entitled "An Act to Provide for the Regulation of Public Utilities," in force

July 1, 1914, to enjoin The Chicago Telephone Company, Bernard E. Sunny, its president, and W. R. Abbott, its general manager; American Telephone and Telegraph Company, Theodore N. Vail and David F. Hall, its president and Chicago agent, respectively, who are made defendants, from putting into effect a certain schedule of long distance *intrastate* telephone rates. A temporary injunction was granted on motion based on the verified bill of complaint. The cause now comes on for final hearing on bill, answers and replication and the stipulation of counsel in open court that the affirmative facts, well pleaded in the answers, are true.

The answers, in the nature of pleas to the jurisdiction of the court, admit that the schedule of telephone rates which the defendants propose to put into effect, have been filed with, but suspended by the Public Utilities Commission and are in some instances materially higher than the rates now in force.

The substance of the defendants' defense is, as set up in their answers, that the telephone systems involved in this action are in the possession of, and being operated by, the Federal Government, through the agency of these defendants; that the defendants have no personal interest in the subject matter; that the action seeks to interfere with the property of the United States and is therefore in effect a suit against the Government, and as such can not be sustained; that there is no provision in either the joint resolution of Congress, the proclamation of the President or order of the Postmaster General, under authority of which the Government has taken possession of and is operating said lines, which reverses to the States any control over *intrastate* rates.

The complainants, on the other hand, contend that the Government's possession and operation of the lines are subject to the "lawful police regulations" of the state, insofar as the fixing of *intrast*ate rates is concerned, and that the power vested in The Public Utilities Commission by the Act creating it, to regulate telephone rates is the exercise of such police power as is reserved to the state by the *proviso* in the resolution of Congress, and that therefore the attempt of the defendants to fix *intrastate* rates is without warrant of law.

A full understanding of these general contentions in all

their details requires a consideration of the joint resolution of Congress, passed on July 16, 1918, the proclamation of the President issued July 22, 1918, and the order of the Postmaster General of August 1, 1918, which are the bases of the defendants' defenses.

The resolution of Congress is as follows:

Joint resolution to authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the some in such manner as may be needful or desirable for the duration of the war, and to provide compensation therefor.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the President during the continuance of the present war is authorized and empowered, *whenever he shall deem it necessary* for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable or radio system or systems, or any part thereof, and to operate the same in *such manner* as may be *needful* or *desirable*, for the duration of the war, which supervision, possession, control or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace; *provided*, that just compensation shall be made for such supervision, possession, control or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by Section 24, Paragraph 20, and Section 145 of the Judicial Code; *provided*, further, that nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communica-

tions, or the issue of stocks and bonds by such system or systems."

The proclamation of the President, after reciting, by way of preamble, the foregoing resolution, provides, *inter alia*, as follows:

"And whereas it is deemed necessary for the national security and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable;

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and *every telegraph* and *telephone system*, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all material and supplies.

It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General, Albert S. Burleson."

On August 1, 1918, the Postmaster General issued an order containing the following provisions:

"Pursuant to the proclamation of the President of the United States, I have assumed possession, control and supervision of the telegraph and telephone systems of the United States. This proclamation has already been published, and the officers, operators and employes of the various telegraph and telephone companies are acquainted with its terms.

Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared, and maturing interest on bonds, debentures and other obligations may be paid in due course, and the companies may renew or extend their maturing obligation, unless otherwise ordered by the Postmaster General. All officers, operators and employes of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same

officers as heretofore, and on the same terms of employment."

Pursuant to the foregoing resolutions and proclamations, the President, through the Postmaster General, did take possession of and commenced to operate the telephone systems of the defendant companies on July 31, 1918. It is under the authority of such possession and operation and pursuant to instructions from the Postmater General, under date of January 7, 1919, to install the rates herein sought to be restrained, that the defendants, as agents of the Postmaster-General (as they claim) contend not only that it is their right, but their duty, in obedience to the said instructions, to put into effect the new schedule of rates, regardless of the disapproval by the Public Utilities Commission.

The right of the Government to take possession of and operate the telephone lines in question, under the authority conferred by the above quoted resolution, passed as a war measure under the powers contained in the Constitution, is not questioned by the complainants. The proceeds from such operation, it is admitted, goes to the Government and becomes the property of the Government absolutely, the compensation to the defendant companies being paid by the Postmaster General in accordance with the terms of a contract entered into between the Government and said companies. There is no express provision in said contract that the compensation to be paid to the defendant companies is to be paid out of the proceeds of the operation of said lines by the Government, or that it is limited in amount by said proceeds.

It is conceded by the defendants, "that if there is jurisdiction in any court to entertain this proceeding, it properly originates in this court rather than in a Federal court; and if there is such jurisdiction, the defendants are subject to be enjoined as prayed, *if* it be further held that the aforesaid *proviso* precludes the defendants from collecting such *intra* state rates as the proper Federal executive officers or agents may deem desirable." The proviso referred to in this concession is that contained in the resolution of Congress of July 16, 1918, *supra*, and is as follows:

"Provided, further, that nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the *law-*

ful police regulations of the several states, except wherein such laws, powers or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

The decision of this case, in our judgment, is dependent on the correct answer to two main questions:

FIRST. Does the above quoted *proviso* reserve to the state the exclusive right, as against the Federal government, through its Public Utilities Commission, to control *intrastate* telephone rates, subject only to the limitation that such control may not interfere with the transmission of Government communications, or the issue of stocks and bonds by the defendant companies; *i. e.*, the right to exercise the police power in its broad sense; or did Congress use the expression "Lawful police regulation" in a more restricted sense as applicable only to measures dealing with the public health, morals and safety?

Second. If it should be concluded that the proviso reserves to the State not only the right to deal with the health, public morals and safety, but with all measures concerning the *public welfare* as well—including the powers to regulate telephone rates—has *any* court jurisdiction to enjoin the defendants, or does the case present a question not justifiable in the courts, without the consent of the Government to be sued?

In this connection it is not claimed by complainants that there is any special provision in the resolution or proclamations under consideration, or any provision of law, permitting the Government to be sued in relation to the subject matter of this action.

As to the First Question.

The regulation of public utilities by the Public Utilities Commission of Illinois is a valid exercise of the *police power* of the State. (*City of Chicago* v. *O'Connell*, 278 Ill. 591.) The fixing of reasonable rates to be charged by public utilities is an exercise of the police power. (*Munn* v. *Illinois*, 94 U. S. 125; *Woodburn* v. *Public Service Cor.*, 82 Oregon 114; *Home Telephone Co.* v. *Los Angeles*, 125 Fed. 554; *Arkansas Rate Cases*, 187 Fed. 297.)

It is said, however, by the defendants, that the phrase "police power" has a primary or restricted significance, as well as a mere comprehensive meaning. That in its primary sense it defines the power of the state which may be exer-

cised for the protection of the public health, safety or morals; while in its broader sense it means the right to enact any and all measures for the protection of life, liberty, property and for the general welfare, the only limitations being found in the Constitution itself. The defendants contend that Congress intended to reserve to the State only the right to exercise the police power in this restricted or primary form—"The right of regulating the position of poles in the streets, the position of wires and their insulation, the rate of speed at which the vehicles of the telephone company might travel, and the sanitary conditions under which the employes might labor, and endless matters of like nature."

The courts have not all adopted a uniform definition of the police power. It has even been referred to by the Supreme Court of the United States as "that somewhat ambiguous term." (*Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347.) That this dual aspect of the terms has been judicially recognized must be conceded. *Freund on Police Power*, Sec. 10, refers to "Police regulations in the strict sense of those terms." Our own Supreme Court in *Hawthorne* v. *People*, 109 Ill., at page 311, says:

> "It is said that this is not a police regulation. That may be true if the term were confined merely to the protection of the health and morals of the people. * * * when exercised by the Legislature, in its more *comprehensive sense*, in the passage of laws for the protection of life, liberty, and property, or laws for the general welfare, the only limitations to restrain its action must be found in the Constitution."

In Manigault v. *Springs*, 199 U. S., p. 48, the court, speaking of the police power in connection with an act of the General Assembly, says:

> "Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people." * * *

There is no Federal Police Power; therefore, when Congress used the expression "police regulations," it must have done so in the sense in which that term has been defined in the several states. (36 Cyc. 1118 (f).)

The sense in which Congress used the term "police regu-

lations" in the *proviso* must be determined from an examination of the entire resolution, and from that only. By the enacting clause thereof the President is given practically unlimited power, "whenever he shall deem it necessary for the national security or defense to take and operate the telephone systems of the country in any manner he may deem needful or desirable for the duration of the war." This broad grant, however, is limited by the *proviso* that such possession and operation shall not be construed as affecting the rights, under existing laws or powers, of the several states in relation to taxation or lawful police regulations. If the resolution went no farther, and the proviso were given the effect which would flow from the reservation to the State of Illinois of all rights under *police regulations*, as this term is defined by the courts in its comprehensive sense, it would clearly confer no power on the Federal Government or its agents to fix *intrastate* rates, and undoubtedly would have reserved to the State powers which might be exercised in such a manner as to interfere with the transmission of Government communications, and possibly give it the right to control the issue of stocks and bonds of the telephone systems. It is manifest that the primary purpose which the Government sought to accomplish in taking over the telephone systems was to be in control of the facilities of communication in time of war.

The resolution provided that "just compensation shall be made for such supervision, possession, control or operation, to be determined by the President." The amount of just compensation allowed by the Government, of course, is vitally affected by the amount of outstanding stocks and bonds of the telephone companies; therefore it was quite proper that the Government should be in a position to supervise all stock and bond issues of such companies.

By article *III* of the said act creating the Public Utilities Commission of this state, authority is conferred on said commission to supervise and control the issue of stocks and bonds of public utilities. If this be a valid provision, such supervision and control would undoubtedly be an exercise of the police power in its comprehensive, rather than its restricted, sense. To guard against the possible attempt by the states to exercise the police power in such a manner as might interfere with the transmission of Government communications or the issue of stocks and bonds by the tele-

phone companies, Congress apparently took the precaution to limit the scope of said proviso by adding an exception as follows: "Except wherein such laws, powers or regulations may affect the transmission of Government communications or the issue of stocks and bonds by such system or systems." Grammatically, we think the words "issue of stocks and bonds," as used in the said exception, are quite as referable to the word "regulations" as to the words "laws" and "powers."

The duty of the court when called on to construe a legislative enactment is to ascertain the legislative intent as therein expressed. Considering the resolution in its entirety, we can not escape the conclusion that Congress, by the *proviso*, reserved to the several states the right to exercise the police power in its comprehensive, rather than in its restricted sense, and by said resolution did not confer upon the President or the defendants, if they be regarded as the agents of the Postmaster General, the right to regulate *intrastate* telephone rates. If this conclusion be correct, then the attempt by the defendants to install a schedule of rates higher than those now in existence, and in violation of the ruling of the Public Utilities Commission, is without warrant of law.

As to the Second Question.

Assuming the correctness of the foregoing conclusion, is the objection that this action is in effect against the Government, althought only the corporations and their resident officers and agents are named as defendants, valid, so as to bring the action within the purview of the rule of law which provides that the Government may not be sued without its consent? We think not.

The opinions of *nisi prius* courts in Ohio, Indiana and Michigan have cited sustaining our view. The recent decided cases (not yet reported) of *Public Service Commission* v. *New England Tel. & Tel. Co.* (Supreme Court of Mass.); *Railroad Commission of Louisiana et al.* v. *Cumberland Telephone & Telegraph Co. and Albert S. Burleson, Postmaster General* (Supreme Court of Indiana); *State of North Dakota* v. *Northwestern Telephone Co. and Burleson, Postmaster General* (U.S. Dist. Court, No. Dakota); and a *nisi prius* decision of Mississippi in the case of *State of Mississippi* v. *Cumberland Telephone & Telegraph Co. et al* hold to the contrary.

The question is by no means free from doubt, and it is with much diffidence and hesitation that this court finds itself unable to reconcile its views to decisions reached by courts of such distinguished ability. These courts, however, with one exeception (The U. S. Dist. Court, No. Dak.) seem to assume that the agents of the Government in attempting to fix *intrastate* rates were acting *within* the scope of the authority conferred by the resolution of Congress; although having the same resolution involved here under consider tion, the Massachusetts Court says at one point: "There is nothing on this record to indicate that the defendant, if and so far as it is an agency of the Federal Government, upon which we express no opinion, is exceeding the limits of power conferred by the resolution, proclamation and bulletin," and from this premise reaches the conclusion that the suit is in effect against the Government; yet, at another point in its opinion, it says: "Therefore it appears to us unnecessary to consider or discuss the merits of the question whether the proviso of the resolution of July 16, 1918, under its reservation of 'lawful police regulations of the several States' justifies rate regulation by a state in the exercise of its police power." Of course if it be assumed that the right to regulate *intrastate* rates is, by the resolution of Congress, vested in the Federal Government and that the defendants here are acting within the scope of their authority, then we should be inclined to the view that the suit is in effect against the Government and should abate, and the fact that the Government as such or its Postmaster General, are not parties defendant would be immaterial. (*Wells* v. *Roper*, 246 U. S., p. 337.) This view grows out of the theory that in such cases the property of the United States, being in the lawful possession or control of its agent, the suit against such agent is an interference with the property of the Government. But where possession of property is south to be acquired by the agent of the United States, without warrant of law, or by an attempted exercise of a right in excess of his authority, quite another question is presented.

If the United States has not the right to fix *intrastate* rates, then it would seem that the attempt of the defendants (even though acting wholly under the order of the Postmaster General) to increase telephone rates within the state, is an unlawful attempt to take from the telephone users

their property without due process of law, to the extent that the proposed new rates exceed those now in existence and which have been approved by the Public Utilities Commission; and a suit against the corporations and individuals committing such unwarrantable acts, even though it be conceded they are acting purely as agents of the Government, without any personal interest in the subject matter, we think, is not an interference with the Government's revenue. The Government does not have possession of, nor the right to obtain possession of such revenue; *i. e.*, the proceeds from the excess rates. The suit merely seeks to restrain them from obtaining possession thereof without any lawful right to do so. Were the suit an attempt to interfere with the defendants collection of intrastate rates, lawfully fixed under the jurisdiction of the Public Utilities Act, manifestly it could not be sustained because such action would be an attempted interference with the defendants acting within the lawful scope of their authority, relative to revenues which they have the undoubted right to collect for the Government.

The cases mainly relied on by defendants, and cited by the courts which have sustained the contention that an action such as this is in effect against the Government and therefore can not be sustained without the Government's consent, are: *Louisiana* v. *McAdoo*, 234 U. S. 627; *Oregon* v. *Hitchcock*, 202 U. S. 60, and *Wells* v. *Roper*, 246 U. S. 335.

In *Louisiana* v. *McAdoo*, *supra*, the State of Louisiana, a producer of sugar operating plantations by convict labor, petitioned the Supreme Court of the United States for leave to bring suit against McAdoo, the then Secretary of the Treasury, to compel him to collect a duty on sugar imported from Cuba, higher than he was at the time collecting under his construction of the provisions of the Tariff Act. The petition was denied. His authority in the matter of the supervision and collection of import duties was not questioned. The proposed action was an attempt to review his judgment in respect to a matter concerning which his authority to act and to exercise a discretion was not questioned. The court on page 633 says:

> "* * * if the matter in respect to which the action of the official is sought is one in which the exercise of either

judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official *entrusted by law with its execution.* Interference in such a case would be interference with the ordinary functions of government."

In *Oregon* v. *Hitchcock*, supra, by leave of court the State of Oregon filed an original bill to restrain Hitchcock, the Secretary of the Interior, and Richards, Commissioner of the General Land Office, from allotting or patenting to Indians or other persons certain lands within the limits of Klamath Reservation. A demurrer was sustained and the bill dismissed. On page 70 the court says:

"Again it must be noticed that the legal title to all these tracts is still in the Government. No patents or conveyances of any kind have been issued * * * under these circumstances, it is not the province of the courts to interfere with the Land Department in its administration."

In *Wells* v. *Roper*, *supra*. Wells filed a bill for injunction to restrain Roper, First Assistant Postmaster General, from annulling a contract theretofore made between Wells and the Postmaster General on behalf of the United States, and from interferring with the carrying out of said contract. The bill was dismissed. On page 337, Mr. Justice Pitney, delivering the opinion of the court, says:

"* * * The averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity *and within the scope of his duties.*"

These cases, it seems to this court, are distinguishable from the one at bar, in this, that the *Louisiana* and *Wells* cases, the Secretary of the Treasury and the Assistant Postmaster General, respectively, were clearly acting within the scope of the power with which they were unquestionably invested, and in reference to subject matter over which they exercised discretionary and not merely ministerial authority. In the *Hitchcock case the* subject matter of the suit was land, the *legal title* to which was in the United States, and the suit was in effect an attempt to take from the Government its property.

In the suit at bar, if our view of the meaning of the

proviso contained in the resolution of July 16, 1918, is correct, the defendants' attempt to fix *intrastate rates* was an act unwarranted in law, as would have been the act of the Postmaster General in taking possession of the telephone systems involved, had said resolution never been passed. This bill prays for no intereference by the court with any revenue to which the United States is entitled by reason of its possession of the telephone systems in question, viz., the revenue accruing from rates approved by the Public Utilities Commission.

Courts are not precluded from enjoining threatened acts of agents or officers of the United States even though they have no personal interest in the subject matter of the litigation, if such threatend acts are wholly unauthorized by law, or are in excess of some authority conferred; neither are they necessarily ousted of jurisdiction to determine whether the threatened acts are wholly unauthorized by law or are ultra vires authority conferred merely because a defendant interposes the defense that he acts as a representative of the Government in relation to matters in which the Government only is concerned.

An early and leading case which discusses the origin, reason and history in this country of the rule that the sovereign Government may not be sued without its consent, is that of *United States* v. *Lee*, 106 U. S. 196, in which Lee filed a suit in the Virginia courts to obtain possession of a portion of the Arlington estate, which at the time was occupied, and for more than ten years had been in the possession of certain officers of the United States army, claiming to hold it as agents of the Federal Government as a national cemetery for the burial of soldiers and sailors. The court says on pp. 215, 216:

> "This examination of the cases in this court establishes clearly this result: That the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession can not be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, * * *"

And on pages 220 and 221:

> "The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government.

* * * Not only such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any man of life, liberty, or property, without due process of law, or to take private property without just compensation." * * *

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

"It is the only supreme power in our system of government, and every man who by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

"Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon the rights in controversy between them and the Government."

In *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, the bill charged that the defendant who was the postmaster at Nevada, Missouri, by order of Postmaster General, who assumed to act under the authority of Acts of Congress, was withholding many letters addressed to the complainant containing money orders; that the business of the complainant was not of a character which subjected it to the application of the law under which the postal authorities were assuming to act; in other words that the Government was exceeding its authority. The bill asked for an injunction restraining the defendant from carrying out the order of the Postmaster General. On page 110, the court says:

"Although the Postmaster General had jurisdiction over the subject matter (assuming the validity of the Acts) and therefore it was his duty upon complaint being made, to decide the question of law which the case stated was within the statute, *yet such decision being a legal error does not bind the courts.*"

An injunction as prayed for was ordered.

To the same effect in principle see:

Philadelphia Co. v. *Stimson*, 223 U. S. 619 and 620.
Noble v. *Union River Logging R. R.* 147 U. S. 171 and 172.
Garfield v. *Goldsy*, 211 U. S. 249.
Davis v. *Gray*, 83 U. S. 203.

In conclusion then, being of the opinion that the *proviso* in the resolution of Congress of July 16, 1918, reserved to the State the exclusive right to determine *intrastate* telephone rates, and that the attempt of the defendants to install a new schedule of increased rates over the objection of the Public Utilities Commission is *ultra vires* their power and without warrant of law, the order of the court is that the injunction heretofore issued in the cause be made permanent.